Supreme Court, U.S.
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No. 87-5468

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SAMUEL BICE JOHNSON,
Petitioner,

v.

STATE OF MISSISSIPPI,
Respondent.

On Writ of Certiorari to the Supreme Court of Mississippi

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 14, 1987
CERTIORARI GRANTED JANUARY 11, 1988

143PP

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Mississippi Proceedings

September 3, 1982	Judgment entered by Circuit Court for Pike County, Mississippi (Hon. L.D. Pittman) sentencing petitioner to death after jury found him guilty of capital murder and imposed death sentence
September 13, 1982	Petitioner's notice of appeal filed with Mississippi Supreme Court
May 8, 1985	Opinion of Mississippi Supreme Court affirming petitioner's conviction of capital murder and death sentence
November 6, 1985	Order of Mississippi Supreme Court denying petitioner's motion for rehearing
May 5, 1986	Denial of petition for writ of certiorari by U.S. Supreme Court
June 16, 1986	Denial of petition for rehearing by U.S. Supreme Court
July 16, 1986	Order of Mississippi Supreme Court setting execution date for August 6, 1986
August 4, 1986	Petitioner's motion for post-conviction relief under Mississippi Uniform Post-Conviction Relief Act, Miss. Code Ann. §§ 99-39-1 *et seq.* (Supp. 1986), and for stay of execution filed with Mississippi Supreme Court
August 4, 1986	Order of Mississippi Supreme Court granting stay of execution until further order of court
March 26, 1987	Certified copy of March 24, 1987 judgment of the New York Court of Appeals

	vacating petitioner's 1963 New York conviction filed with Mississippi Supreme Court
April 25, 1987	Petitioner's supplemental memorandum in support of motion for post-conviction relief based on vacatur of 1963 New York conviction filed with Mississippi Supreme Court
May 27, 1987	Opinion of Mississippi Supreme Court denying petitioner's motion for post-conviction relief and setting execution date for July 22, 1987
June 4, 1987	Petitioner's motion for a stay of execution pending filing of a petition for writ of certiorari filed with Mississippi Supreme Court
June 11, 1987	Petitioner's motion for rehearing filed with Mississippi Supreme Court
July 13, 1987	Order of Mississippi Supreme Court granting stay of execution pending further order of court
July 15, 1987	Order of Mississippi Supreme Court denying petition for rehearing

New York Proceedings

July 30, 1986	Motion and supporting affidavits filed by petitioner pursuant to N.Y. Crim. Proc. Law § 440.10 (McKinney 1963) in the County Court for Monroe County, New York, seeking to vacate 1963 conviction for second degree assault
September 25, 1986	Argument before Judge John J. Connell of Monroe County Court on petitioner's motion for post-conviction relief
October 25, 1986	Opinion of Judge Connell finding that petitioner was never advised of right to appeal in 1963 and directing that petitioner be resentenced to permit a direct appeal

November 12, 1986	Sentencing hearing before Judge Connell at which petitioner, after waiving right to be personally present, is resentenced to 1½-3 years in prison, with court noting that petitioner has already served his time
November 17, 1986	Notice of appeal and motion for summary reversal filed by petitioner in Appellate Division, Fourth Department
December 3, 1986	Order of Appellate Division, Fourth Department, denying motion for summary reversal
December 12, 1986	Order of Appellate Division, Fourth Department, denying motion for rehearing
January 11, 1987	Order of Hon. Richard D. Simons, Associate Judge of New York Court of Appeals, granting leave to appeal to New York Court of Appeals
March 24, 1987	Opinion of New York Court of Appeals reversing order of Appellate Division, vacating 1963 conviction and dismissing indictment

IN THE CIRCUIT COURT
OF PIKE COUNTY, MISSISSIPPI

No. 12567-D

STATE OF MISSISSIPPI

—versus—

SAMUEL JOHNSON a/k/a SAMUEL BICE

ORDER

September 3, 1982

THIS DAY, this cause came on to be heard on motion of the State for the Court to enter its order accepting into evidence (at the sentence phase of the trial of this cause) any and all testimony, together with any and all exhibits thereto, and/or general exhibits proffered by the State of Mississippi and accepted into evidence at the guilt phase of the trial of this cause, and the Court after having heard and considered the same, being fully advised in the premises, is of the opinion and so finds that said motion is well taken and should be sustained.

IT IS, THEREFORE, ORDERED AND ADJUDGED, that any and all testimony, together with any and all exhibits thereto, and any and all general exhibits proffered by the State of Mississippi and accepted into evidence by this Court at the guilt phase of the trial of this cause should be, and the same hereby is, accepted into evidence, at the sentence phase of the trial of this cause; and that all such testimony and exhibits should be and the same hereby are, incorporated herein by reference

and made a part of the record of this cause as fully as if set out in words and figures herein.

SO ORDERED AND ADJUDGED, this the 3d day of September, 1982.

/s/ L. D. Pittman
L. D. PITTMAN
Circuit Judge

IN THE CIRCUIT COURT
OF PIKE COUNTY, MISSISSIPPI

(Exhibit Introduced at Sentencing
Hearing September 3, 1982)

CERTIFICATION

28 USC 1738

STATE OF NEW YORK)

COUNTY OF MONROE)

I, PATRICIA B. ADDUCCI, Clerk of the County of Monroe, State of New York, of the County Court of said County and of the Supreme Court, both being Courts of Record having a common seal, do certify that the certificates annexed to this certificate are true and correct. Copies of the originals on file and of record in my office in the cases of the People of the State of New York vs. Samuel Bice, a/k/a Samuel Johnson on Indictment No. 32, filed February 21, 1963, Indictment No. 313 filed September 23, 1966 and Indictment No. 1057 filed November 22, 1974; and that the originals thereof constitute and are a portion of the record of such proceedings in said Court. Dated, and the seal of said Court affixed, this 23rd day of July, 1982.

/s/ Patricia B. Adducci
PATRICIA B. ADDUCCI
Monroe County Clerk

STATE OF NEW YORK)

COUNTY OF MONROE)

I, HYMAN T. MAAS, Administrative Judge of the County Court in and for the County of Monroe, State of New York, hereby certify that Patricia B. Adducci, who made and subscribed the foregoing attestation is now, and was at the time of the execution thereof, the Clerk of the County of Monroe, State of New York, of the County Court of said County, and of the Supreme Court, as set forth therein and that the foregoing attestation made by her in her official capacity is in proper form and her signature thereto is genuine. Dated, and the seal of my office affixed this 23d day of July, 1982.

[SEAL]

/s/ Hyman T. Maas
HYMAN T. MAAS
County Court Judge

COMMITMENT TO RECEPTION CENTER
NEW YORK STATE DEPARTMENT
OF CORRECTION
ELMIRA, NEW YORK

At a term of the County Court in the county of Monroe held at Rochester, New York on the 9th day of April 1963.

Present: HON. JOHN LOMENZO,
Monroe County Judge

THE PEOPLE OF THE STATE OF NEW YORK

versus

SAMUEL BICE

The defendant having been found guilty by Verdict of a Jury of a felony, to wit: Assault, Second Degree, with intent to Commit Rape, First Degree, as charged, committed on or about February 9, 1963 and it appearing to the satisfaction of the court from the evidence that the said defendant is a male person between the ages of sixteen and twenty-one years, to wit: twenty (20) years of age, it is

ORDERED, ADJUDGED AND DIRECTED by the Court, that the said Samuel Bice for the crime aforesaid, be and he hereby is sentenced to imprisonment in an institution under the jurisdiction of the New York State Department of Correction, and committed to the RECEPTION CENTER, ELMIRA, NEW YORK, for classification, program planning and transfer in accordance with

the provisions of Article 3-A of the Correction Law, for a term as set forth in paragraph 2 below:

1. A reformatory term of not to exceed five years,

2. A term of not less than 1 years and 6 months nor more than 3 years and 0 months *

A TRUE EXTRACT FROM THE MINUTES:

/s/ A. Gould Hatch
Signature
Clerk
Official Title

(* Footnote Omitted in Printing)

IN THE CIRCUIT COURT
OF PIKE COUNTY, MISSISSIPPI

(Title Omitted in Printing)

EXCERPTS FROM TRANSCRIPT OF SEPTEMBER 3, 1982 CHAMBERS CONFERENCE

(Objections to Judge's Instructions to Jury)
(Tr. 2196-97)

* * * *

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HAD IN CHAMBERS WITH THE DEFENDANT PRESENT.)

OBJECTIONS TO INSTRUCTIONS
FOR THE STATE

BY THE COURT: PS-1. That's electing a foreman. Do you have any problem with that one?

BY MR. HARPER: The only problem I have, Judge, is it's finding him again. What does it say, Your Honor?

BY THE COURT: (Reads said instruction.)

BY MR. HARPER: No problem.

BY THE COURT: It will be given.

Now, PS-2 is a standard instruction except that we want to make sure that you put all of the mitigating circumstances in there.

BY MR. HARPER: Your Honor, I have some objections to the aggravating circumstances that are listed.

BY THE COURT: All right, give them to me.

BY MR. HARPER: Okay. On number (1), I object to this as being an aggravated circumstance in terms of remoteness of the conviction, this being a conviction that is almost 20 years old. I don't think that it should be considered by the Jury due to its remoteness.

BY THE COURT: Get me the statute on it, please.

BY MR. ROBERTS: Aggravating? It's right here.

BY MR. EVANS: I'd like this on the record. In number (2), the word "arrest" is left out after avoiding.

BY MR. HARPER: And, Judge, I'd also object on number (1) on the basis of the Sixth, Eighth and Fourteenth Amendments.

(OFF THE RECORD.)

BY THE COURT: That objection will be overruled. All right, now—

BY MR. HARPER: Your Honor, one thing I'd like to say in response to that, I know that Mr. Evans is going to comment on that previous conviction and I want it to be properly referred to and I believe that the proper conviction was a second degree assault with intent to commit first degree rape. I want it referred to as that.

* * * *

EXCERPTS FROM TRANSCRIPT OF SEPTEMBER 3, 1982 SENTENCING HEARING

(Judge's Instructions to Jury) (Tr. 2263-70)

* * * *

BY THE COURT: Ladies and Gentlemen, I will now read you the instructions or the law that you will apply in this case, or this phase of the case.

The Court instructs the jury that for this phase of the trial you shall elect from among yourselves one juror to serve as foreman. The foreman shall write your verdict on a separate sheet of paper and in the form prescribed by the instructions which follow.

You have found the Defendant, Samuel Johnson, guilty of the crime of "Capital Murder." You must now decide whether the defendant shall be sentenced to death or to life imprisonment. In reaching your decision, you must objectively consider the detailed circumstances of the offense for which the defendant was convicted, and the character and record of the defendant himself. To return the death penalty, you must unanimously find from the evidence beyond a reasonable doubt that the aggravating circumstances—those which tend to justify the death penalty—outweigh the mitigating circumstances—those which tend to justify the less severe penalty of life imprisonment. Consider only the following elements of aggravation in determining whether the death penalty should be imposed, to-wit

1) That the Defendant, Samuel Johnson, was previously convicted of a felony involving the use or threat of violence to the person of another;

2) That the Defendant, Samuel Johnson, committed the capital murder for the purpose of avoiding arrest or effecting an escape from custody;

3) The capital murder was especially heinous, atrocious and cruel,

then you must proceed to weigh the aggravating circumstances and the mitigating circumstances, one against the other, to determine whether the aggravating circumstances you have found, if any, outweigh the mitigating circumstances.

The mitigating circumstances which you may consider include the following, to-wit:

1) Any circumstance or combination of circumstances surrounding the defendant's life and character which reasonably mitigates against imposition of the death penalty.

2) Samuel Johnson's ability to adjust well to prison life without violence.

3) The defendant did not fire the gun.

4) Samuel Johnson has shown no incidents of violence in past stays in prison.

5) Samuel Johnson's only previous conviction of a felony involving the use or threat of violence to the person of another was over 19 years ago on April 9, 1963.

6) Any and all other matters, facts, and circumstances which you as jurors may consider from the evidence as mitigating.

If you unanimously find from the evidence beyond a reasonable doubt that any one or more of the aggravating circumstances listed above do exist, and if after weighing the mitigating circumstances and the aggravating circumstances, one against the other, you further find unanimously from the evidence beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances and that the death penalty should be imposed, your verdict shall be written on a

separate sheet of paper, shall be signed by your foreman, and shall be in the following form, to-wit:

> "We, the Jury, find unanimously and beyond a reasonable doubt the following aggravating circumstances, to-wit: (fill in the blanks by listing the aggravating circumstances, if any, which you unanimously find beyond a reasonable doubt from those listed above using the same language as they are listed)
>
> "We, the Jury, find unanimously from the evidence and beyond a reasonable doubt that after weighing the mitigating circumstances and aggravating circumstances, one against the other, that the aggravating circumstances do outweigh the mitigating circumstances and that the defendant should suffer the penalty of death."
>
> Signed by the foreman.

If you fail to find any aggravating circumstances unanimously and beyond a reasonable doubt, or, if you find unanimously and beyond a reasonable doubt one or more aggravating circumstances, that after weighing the aggravating circumstances and mitigating circumstances, one against the other, you fail to unanimously find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances, then your verdict shall be in the following form, to-wit:

> "We, the Jury, find the defendant should be sentenced to imprisonment for life in the State Penitentiary."

If, after reasonable deliberation you cannot agree as to the punishment, you should certify your disagreement to the Court and the Court shall, as required by the law, impose a sentence of life imprisonment. In the event that you are unable to agree as to the punishment, your verdict shall be written on a separate piece of paper and shall be in the following form, to-wit:

> **"We, the Jury, after due deliberation have been unable to agree upon the punishment and hereby so certify the same to the Court and request the Court to dismiss the jury from further deliberation."**

The Court instructs the jury that in order to impose a sentence of death the law requires that you must reach a unanimous verdict. In the event that you do not reach a unanimous decision, the law requires that the Circuit Judge sentence the defendant, Samuel Johnson, to life imprisonment.

The Court instructs the jury it is now your duty to determine what punishment must be imposed upon Samuel Bice Johnson. You must determine which of the following punishments is appropriate to impose on Samuel Bice Johnson:

1) Life imprisonment

or

2) Death by inhalation of a lethal gas.

The Court instructs you the jury that Samuel Bice Johnson cannot be sentenced to death by inhalation of a lethal gas unless each juror finds beyond a reasonable doubt that the statutory aggravating circumstances outweigh the mitigating circumstances. Even if you find the existence of a statutory aggravating circumstance beyond a reasonable doubt, you cannot automatically impose a sentence of death. You are bound by law and your oath as jurors to consider those mitigating factors found in the statute, and any other mitigating evidence presented, you may impose a sentence of death only if you conclude beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances.

The Court instructs you that mitigating circumstances are those which do not constitute a justification or excuse for the offense in question, but which, in fairness and mercy, may be considered as extenuating or reducing the degree of moral culpability or blame.

The Court instructs the jury that a mitigating circumstance does not have to be proven beyond a reasonable doubt to exist. You must find that a mitigating circumstance exists if there is any substantial evidence to support it.

The Court instructs the jury that before Samuel Bice Johnson can be sentenced to death by inhalation of a lethal gas, the statutory aggravating circumstances must be proven beyond a reasonable doubt by the prosecution, and it must also be proven beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances. If upon the evidence in this phase of the proceedings you have any doubts as to the appropriate punishment, then you must return a verdict sentencing Samuel Bice Johnson to prison for the remainder of his natural life.

The Court instructs the jury that the law presumes that a defendant convicted of capital murder is innocent of any aggravating circumstances. The presumption of innocence is sufficient to justify a finding that no aggravating circumstances exist. Unless you are satisfied beyond a reasonable doubt of the defendant's guilt of at least one aggravating circumstance, you are instructed to return a verdict sentencing Samuel Bice Johnson to prison for the remainder of his natural life.

The Court instructs you that if you find one or more statutory aggravating circumstance proved beyond a rea-

sonable doubt, then you must consider all the evidence tending to establish one or more mitigating circumstances and give that evidence and those mitigating circumstances such weight as you feel they should be given. If the weight of the mitigating circumstances is equal to or exceeds the weight of the aggravating circumstances, you must return a finding of life imprisonment for Samuel Bice Johnson.

The Court instructs the jury that you must consider any evidence of mitigating circumstances. However, you cannot consider any aggravating factors not specifically mentioned. If you have a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances, you are obligated to resolve that doubt in favor of the defendant and return a finding of life imprisonment.

The Court instructs the jury that you are not required to make a special finding of any mitigating circumstances in order to return a verdict that the accused should be sentenced to life in prison. However, before you may reach a verdict that the accused should suffer the penalty of death, you must unanimously find in writing that after weighing the mitigating circumstances and the aggravating circumstances, one against the other, the mitigating circumstances do not outweigh the aggravating circumstances and the accused should suffer the penalty of death.

The Court instructs the jury that in your weighing of mitigating and aggravating circumstances the number of either is wholly immaterial and must not be so considered by you, but instead, that you must consider the same in terms of their individual importance and effect upon your minds as jurors, which is to say, by way

of example, that one of either of such circumstances, standing alone, may, if it satisfies your minds as jurors, outweigh all multiple other circumstances.

* * * *

EXCERPTS FROM TRANSCRIPT OF SEPTEMBER 3, 1982 SENTENCING HEARING

(Prosecutor's Closing Argument) (Tr. 2271-87)

* * * *

CLOSING ARGUMENT
ON BEHALF OF THE STATE

BY MR. EVANS: Ladies and Gentlemen, this is the very last stage of the proceedings and it follows the same procedure at this stage as followed or it did follow yesterday. I'll be allowed to open this stage and to close it. Again, we get the same amount of time, but again in this stage I have the burden, the people of Mississippi, have the burden of proving the mitigating circumstances beyond a reasonable doubt.

I'll remind you again that nothing the lawyers have to say is evidence. The evidence is everything you've heard this week, not just this morning but all week, from the witness stand and the exhibits that have been testified to.

What you have to do at this stage is to compare the aggravating circumstances, which, as the Judge told you, are the ones that justify your verdict directing Judge Pittman to enroll the sentence of death against Samuel Johnson. You compare those against the mitigating circumstances, the ones that say he should receive the less severe, a life sentence. You don't count them. You compare them. You weigh them. So, in other words, you can find that just one aggravating circumstance was so important and weighed so heavy that it outweighed every one of the other mitigating circumstances. You could find that every mitigating circumstance that you consider does, in fact, exist and you could find that only one aggravating circumstance—for instance, the one that says Billy was an officer acting in his line of duty—if I could get the wording exactly right. Excuse me. "That

Samuel Johnson committed the capital offense for the purpose of avoiding arrest or effecting an escape from custody." You could find that that one was so great that it outweighed all the others. Then that would justify your verdict, which would direct Judge Pittman to enroll the sentence of death.

When looking at these aggravating circumstances for the purposes of getting ready to compare them, I think the logical place to start would be Samuel Johnson's participation, which we have already discussed and which we've already seen. It was, as I said the first day and this is the last day I'll repeat it, he started it all. It was his idea to kill Billy or he wouldn't have told Otis Fairley to hand him the knife. He's the one that stabbed him. And it was Samuel Johnson that gave the order for Charles Montgomery to shoot Billy. To me, that's pretty substantial participation. And I said Monday morning that if it wasn't for Samuel Johnson, Billy would still be alive. And I said it because I believe it, because I thought I could prove it, and we have. And I still believe it. Now, are all of these facts, this evidence that's proven, when combined with Mr. Johnson's prior record, is that sufficient aggravating circumstances. You do here again today just like you did yesterday. You take the facts and you apply that to the law the Judge read you.

The first aggravating circumstance you have to see if you can determine whether it exists is that the Defendant, Samuel Johnson, was previously convicted of a felony involving the use or threat of violence to the person of another.

We have in evidence and you'll be allowed to take it back with you into the jury room when you go back, the certified copy of Samuel Johnson's conviction of second degree assault with intent to commit first degree rape. By definition, that is a violent act. Dr. Fisher said in

his expert opinion that was certainly a violent act. But with that document, you don't have to take our word for it, that it's a violent act. You can look at that document and see that that aggravating circumstance does, in fact, exist. So we know that one exists.

The second one—I want to make sure I get them right—that the Defendant, Samuel Johnson, committed the capital murder for the purpose of avoiding arrest or effecting an escape from custody.

You heard the testimony and remember the testimony of Ron Smith who said he found Billy's fingerprints on a document found in the back of the LTD. And that all the witnesses, including Otis Fairley, said that Mr. Johnson got out when Billy requested him to. That he went and stood until such point as he got the knife. Otis Fairley didn't say that, but that's what was proven. That means that Samuel Johnson wanted Billy killed in order to prevent the search of that back seat and to escape from Billy's custody when he was arrested for whatever that search revealed. So the second aggravating circumstance we know exists from the testimony we've heard this week.

The third one: the capital murder was especially heinous, atrocious and cruel.

I had to look a couple of those words up in the Dictionary, to be absolutely honest with you, and when I did I found that the word "heinous" means shockingly evil. Murder is an evil act. There'll be no argument with that from anybody, I don't think. Well, is the killing of a Highway Patrolman beside one of the busiest highways in our state shocking? Does it shock you to know that? It shocked me. Of course, you know what cruel means. To me, the cruelty of it has increased by the lack of necessity or justification. And earlier, we have talked about how unnecessary this was, about the seven or eight chances they had to leave without killing Billy. So the third one exists as well.

So if you conclude that even though only one can outweigh all the others, they all three do, in fact, exist and even if you decide to find that all the mitigating circumstances exist but these three outweigh them.

The form of the verdict you are to use is a bit complicated and I want to go over it with you just for a second because I had to do a little studying to figure out exactly how it was written myself. In the first instruction or one of the first ones, the Judge told you that the first thing you do is elect a foreman. Then you start considering, comparing and weighing the aggravated circumstances and the mitigating circumstances. When you find that the aggravating circumstances outweigh the mitigating circumstances, what your foreman does, he takes a piece of blank paper and he writes, "We, the Jury, find unanimously and beyond a reasonable doubt the following aggravating circumstances, to-wit," and it's typed right there. (Showing the Jury.) So all you've got to do is copy that. Then you turn back to the first page and you write down which one of these aggravating circumstances exist, or if you feel they all exist, you write them all. You copy them word for word just like they're written there, (1), (2), (3). Then under that, well, then you turn to this page, the third page of this long instruction, which has been marked right PS-2. You turn to the third page—it's the only three-page instruction in there—and you write—your foreman writes, "We, the Jury, find unanimously from the evidence and beyond a reasonable doubt that after weighing the mitigating circumstances and aggravating circumstances, one against the other, that the aggravating circumstances do outweigh the mitigating circumstances and that the Defendant should suffer the penalty of death." Then the foreman signs his name. You list them first, (1), (2), (3), the ones you find. Then you write this number under it. And the foreman and only the foreman is required to sign it.

Now, what you're considering is serious business. It's about as serious as it gets in our law and in our lives. And a lot of good-hearted and well-meaning people who don't understand the purpose and the necessity of capital punishment will probably say that I'm very cold and harsh and cruel when I stand here and I say that because of having been convicted of second degree assault with intent to commit first degree rape and capital murder that Samuel Johnson should die. But that wasn't too harsh and cold and cruel for Billy. And the decent, law-abiding people of our state has, speaking through our Legislators, said that in certain cases the death penalty is proper. And the U.S. Supreme Court has said, and the Judge told you in his instructions, that not only in certain cases is it proper, but in other cases it's just and it's necessary. The evidence in this case and the law shows you not only that it's proper, but that it is just and absolutely necessary.

This makes the tenth time that I have either tried or prepared for trial a capital murder case, and if Mr. Johnson's lawyers argue like all those others I've been involved in, they'll ask you for mercy, they'll ask you for compassion; and they'll ask you for compassion, if they're like the others, and tell you that Samuel Johnson doesn't want to die. Billy didn't want to die either. And if they argue like the others, they'll ask you for mercy and plead for Samuel Johnson's life. Billy plead for his life. But mercy wasn't in the heart of Samuel Johnson last New Year's Eve when he told Charles Montgomery twice to shoot. I don't know, they may or may not, most of the others have, try to appeal to the Christian virtues of our jurors and ask you to forgive Samuel Johnson. I'm not trying to tell you your business or be disrespectful, but forgiveness is not the privilege of this Court. That belongs to the Lord. You are here enforcing the law and judging the actions of this man. They may, like most of the others, go even so far as to tell you that if you believe in the Bible, you're not going to believe in capital punishment, you'll be opposed to it. In case they

do tell you that, I'm going to tell you this first. That's just not true. The Bible doesn't demand it, no, of course, not, it does not demand it, but it certainly does permit it. You heard Reverend Thompson read the verse, "If a man smiteth a man, so that he die, shall he surely be put to death." That was from Exodus, the Old Testament. Reverend Thompson doesn't believe in that. I don't criticise him for that. Don't think for a moment I am. He has a right to that opinion. I don't agree with Reverend Thompson, but I respect his right to his opinion and his right to hold that opinion. And Mr. Harper said he wouldn't go into the New Testament after I asked Reverend Thompson to read that, but I will just in case he decides to do it in a minute. You recall several instances where Jesus discussed those laws, those Mosaic laws, and you will remember that he never did question the validity of them. In fact, he said that as Christians we're obligated to follow the laws of the state. What he did was said before you enforce those laws, give us proof, credible, competent evidence. And the people of Mississippi have shown, over a period of a week's time, credible, competent evidence that the aggravating circumstances outweigh the mitigating circumstances. And all we're asking you to do is to enforce the law that the people of Mississippi has made. That's all. And on behalf of those law-abiding people, in a short while, I'll again ask you to announce to them that you realize and you recognize that the aggravating circumstances do, in fact, outweigh the mitigating ones and that Judge Pittman should be told by your verdict to direct that Samuel Johnson suffer the penalty of death.

BY THE COURT: Mr. Harper.

CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT

BY MR. HARPER: May it please the Court, Ladies and Gentlemen, it has been a long week. I've prepared for this stage for a long time. This being a capital murder case, we had to be prepared for this in case it happened, and I have thought for well over a month what I would say if I got up here. I've thought all this week what I might say and last night and today and still don't know what all to go over with you.

I'm not here right now to discuss anybody's views on capital punishment or the Bible, the New Testament and the Old Testament in that Bible. The only thing I'm here to do right now is to ask you to spare his life. And Mr. Evans is right, I am getting up here asking for mercy. I am asking you to spare his life.

I want you to remember what Dr. Fisher said. And on this Instruction, PS-2, that Mr. Evans has referred to, there are several things that you are to consider as mitigating circumstances. I want you to study this instruction when you get back there and I want you to remember what Dr. Fisher said, that he can function in prison with that life sentence and not be violent.

I want you to remember also especially about Charles Montgomery. You've heard a lot about Charles Montgomery in this case. He's the man that the State has said and that you believe fired the gun that shot the officer. I want you to remember that no once forced Charles Montgomery to shoot. He was a grown man, an adult. If anyone told him to fire, it was his decision. He was the one. Nobody forced him to shoot the officer. And the State has told you that it was the gunshot wound that killed the officer, and I want you to remember that, that no one made Charles Montgomery pull that trigger. I ask you to remember that. I ask you to give him the same consideration, to give Sam the same consideration that was given to Charles Montgomery. I ask you to study these things.

I ask you not to consider the prior conviction, the violent conviction of Sam's in 1963. I hope that you'll be able to put that in the back of your mind and remember how long ago that was.

May I have some water?

BY THE COURT: Yes, sir.

(BRIEF PAUSE.)

BY MR. HARPER—CONTINUING: I ask you to take your time when you get back there.

You are probably wondering where his family is or why they aren't here. You know he is from Rochester, New York. He's poor. They couldn't make it. They don't have the money to make it. If they were nearby they would be here. They would've testified and they would've begged for his life.

I ask you to study the instruction here and remember those things, and I ask you to think about what it's going to be like if he goes to the gas chamber, what it will be like there, and I ask you to spare his life.

BY THE COURT: Mr. Evans.

FINAL CLOSING ARGUMENT ON BEHALF OF THE STATE

BY MR. EVANS: I can tell you what it's like. It's a gray room all the way around about like this and there's a bench in it and under that bench, there is a pail of water and above that are two pills, and the Sheriff pulls the handle that drops those pills into water. Then Sam Johnson will take a deep breath and in five or ten seconds his life will be ended. There will be no pain, there will be no agony, there will be no suffering. He won't feel a knife in his back and he won't feel a bullet exploding in his brain. And that's what it's like.

Dr. Fisher said that Samuel Johnson can adapt to prison life. My first response was that we're not here to see how Sam Johnson will adapt to prison life. What concerns me is what is going to happen the next time he decides to commit a second degree assault with intent to rape and what is going to happen the next time he decides he wants a Highway Patrolman or another law enforcement officer dead. You heard Dr. Fisher's testimony that

inside prison his potential for violence was low, but outside, it was high. I just can't get concerned about how he would adapt to prison life when I know that his potential for dangerousness on the outside is high.

Mr. Harper wants you to believe that a life sentence is sufficient punishment and that capital punishment is not proper here, but with—I'm not being critical, but he doesn't realize or he doesn't understand that capital punishment is symbolic of how much that we value innocent human life.

When you vote to tell Judge Pittman that Samuel Johnson should suffer the penalty of death, you're going to be telling Samuel Johnson and others like him who commit second degree assault with the intent to commit first degree rape and who have a high potential for violence and who murder Highway Patrolmen and other innocent people when they're doing their jobs and going about their own business, you're going to be telling them that the people of our state have the courage to rid our state of people like that; that we don't want people like that in our state, especially when they have a violent record like that and the potentiality of hurting somebody else. Dr. Fisher said we can only judge—or best judge Mr. Johnson's future actions by his past ones. And, again, he told you clearly that second degree assault with intent to commit first degree rape is a violent act; and when Sam Johnson is on the outside, his potentiality for violent acts were right the opposite. We can't afford to find out if Dr. Fisher is right or wrong. If he's right, then Sam Johnson is a dangerous person. He said Samuel Johnson failed to return from his furlough and to return to the penitentiary again and again. Yet dispite that, dispite the aggravating circumstances, dispite the fact that he spent 10 of the last 18 years off and on in the penitentiary, despite the fact that he has a high potential for future violent acts of hurting somebody else, they want you to sentence him to life. And they want you to have sympathy for him because his family is

poor. I can understand that. My family is poor, a lot of my friends' families are poor, but they don't commit second degree assault with intent to rape and they don't have a high potential for hurting people when they're outside and they don't kill Highway Patrolmen or anybody else. They don't hurt anybody. They want you to show him mercy and beg for his life. I don't have to remind you, Billy begged for his too. And show him the mercy that he showed Billy when he told Charles Montgomery to shoot him, and show him the compassion and the sympathy that he showed Billy when he drove off and left him laying in that ditch. You do that and do you know what we'll have? We'll have that which is rightly due in return for the wrong that Samuel Johnson has committed against the laws of the people of this state, against the law-abiding people of the state that Bily chose to serve, not just what's rightly due in return for the wrong he committed to Billy, but to the people that Billy was serving as well, the good, law-abiding people in our state.

Mr. Harper said that Charles Montgomery pulled the trigger on his own, nobody made him. But it was Samuel Johnson's idea to kill Billy. Samuel Johnson gave Charles Montgomery the idea to get the gun. He said, "Get his gun." When Montgomery got it, Montgomery went back to the LTD to get in it, and Samuel Johnson said, "No, shoot him. Shoot him." The first time he said shoot him, Montgomery hesitated. Then Samuel Johnson insisted, "Shoot him," and he did. No, Samuel Johnson didn't pull the trigger with his finger, but from what he did do, if he had've had the gun he would have. The murder was there in his heart.

They ask you to send Samuel Johnson to the penitentiary. Dr. Fisher said that was his home. He commits second degree assault with intent to commit first degree rape. He is returned to the penitentiary again and again. He has a high potentiality for violence and then he finally graduates to capital murder, and they want you to send him back home and live the life of Riley at the penitentiary watching TV and playing dominoes. If it wasn't for the fact that it's just so wrong, it would be funny, wouldn't it? The rest of us out here trying to do right by each other and trying to follow the law, Samuel Johnson does just the opposite and you let him go home.

You can't allow, must not allow, a misguided sense of compassion and mercy to erase our concern for justice and for our laws. And you might be saying to yourself, "Well, if I vote to tell Judge Pittman to direct that Samuel Johnson suffer the penalty of death, that won't bring Billy back." No, it won't. And it's not supposed to. That's not what our courts are for. But it will stop Samuel Johnson from hurting anybody else and it will tell others like him that we don't reward people who commit second degree assault with the intent to commit first degree rape and who are returned to the penitentiary again and again and again and who have high potentiality for violent acts and who kill law officers who are doing their jobs. It will tell them too that we have a society where our laws mean something, whether it's a society that stands for order, an orderly society. And it will tell me something too. It will tell me that Billy's life was worth as much as Samuel Johnson's and it will tell me that Billy's life went for something good and something decent and something worth while and it will tell me that, with all the imperfections it's got and with all its frustrations and with all the criticism it gets, we have a system that really does work after all. And, as I told you before, I will now, in the name of that system and the decent, law-abiding people in Mississippi, and by the authority that the ones in the Thirteenth District gave me, I'm going to ask that you retire and come back in a little while and tell Judge Pittman by your verdict, yes, we find that the aggravating circumstances do outweigh the mitigating circumstances and we find that a man who commits second degree assault with intent to commit first degree rape and a man who has been returned to the penitentiary again and again and

again, spent 10 of the last 18 years in the penitentiary, and a man who has a high potential for hurting other people and a man who has taken an innocent life when he killed an officer while that officer was enforcing the laws of our good people, has chosen himself to forfeit his life in the eyes of God and in the eyes of our law. You are not the one executing Samuel Johnson. Regardless of what they tell you, you're not the one. He chose that himself when he decided to be a criminal in 1963. So, as I said, I now ask you to retire and return shortly and tell Judge Pittman that the aggravating circumstances outweigh the mitigating circumstances and because of that, Samuel Johnson should suffer the penalty of death.

* * * *

EXCERPTS FROM TRANSCRIPT OF SEPTEMBER 3, 1982 SENTENCING HEARING

(Jury Findings and Verdict) (Tr. 2288-90)

* * * *

BY THE COURT: The Clerk will furnish the Jury the Instructions, the Exhibits and a blank sheet of paper and a pencil with which to write its verdict.

Now, the two alternates will keep your seats.

The Jury will now retire to the jury room to consider your verdict.

(Whereupon, the Jury retired to the jury room to consider their verdict at 2:51 p.m., after which the following proceedings were had.)

BY THE COURT: The two alternates will be finally dismissed. I want to thank you for coming and serving on the Jury. I believe Mr. Fortenberry has your warrants and you will be now finally dismissed. Thank you.

Do you have a way home?

(The Jurors responded in the affirmative.)

Court will be in recess to await the return of the verdict.

(Whereupon, Court recessed at 2:52 p.m. to await the return of the verdict, after which the following proceedings were had at 4:10 p.m. with the Defendant present.)

BY THE COURT: Now, when the verdict is read, there cannot be any emotion shown of the audience.

Let the Jury come in.

(Whereupon, the Jury returned to the Courtroom at 4:12 p.m., after which the following proceedings were had.)

BY THE COURT: Have you reached a verdict?

(Whereupon, a Juryman handed the verdict to the Clerk and the Clerk handed the verdict to the Court.)

The Clerk will read the verdict.

BY THE CLERK: (Reading) We, the Jury, find unanimously and beyond a reasonable doubt the following aggravating circumstances, to-wit:

(1) That the Defendant, Samuel Johnson, was previously convicted of a felony involving the use or threat of violence to the person of another;

(2) That the Defendant, Samuel Johnson, committed the capital murder for the purpose of avoiding arrest or effecting an escape from custody.

(3) The capital murder was especially heinous, atrocious and cruel.

We, the Jury, find unanimously from the evidence and beyond a reasonable doubt that after weighing the mitigating circumstances and aggravating circumstances, one against the other, that the aggravating circumstances do outweigh the mitigating circumstances and that the Defendant should suffer the penalty of death.

Signed Denman E. Cook, Foreman of the Jury.

* * * *

IN THE CIRCUIT COURT
OF PIKE COUNTY, MISSISSIPPI

No. 12,567-D

THE STATE OF MISSISSIPPI

v.

SAMUEL JOHNSON, a/k/a SAMUEL BICE JOHNSON

FINAL JUDGMENT (SENTENCING STAGE)

Came the District Attorney who prosecutes for the State and the Defendant, Samuel Johnson, a/k/a Samuel Bice Johnson, in his own proper person and with counsel, who on September 2, 1982 was found guilty of Capital Murder by a jury composed of Pamela Smith and eleven other good and lawful persons of Pike County, Mississippi and the same jury heard evidence for both the State and the defendant in the sentencing stage of the above styled and numbered cause, and after hearing all the evidence, receiving the instructions of the Court and hearing argument of counsel, retired to consider their verdict, and after considering same returned into open court upon their oaths the following verdict, to-wit:

> "We, the jury, find unanimously and beyond a reasonable doubt the following aggravating circumstances, to-wit:
>
> (1) That the defendant, Samuel Johnson, was previously convicted of a felony involving the use or threat of violence to the person of another;
>
> (2) That the defendant, Samuel Johnson, committed the capital murder for the purpose of avoiding arrest or effecting an escape from custody;

(3) The Capital Murder was especially heinous, atrocious and cruel. We, the jury, find unanimously from the evidence and beyond a reasonable doubt that after weighing the mitigating circumstances and aggravating circumstances, one against the other, that the aggravating circumstances do outweigh the mitigating circumstances and that the defendant should suffer the penalty of death.

/s/ Denman E. Cook
Foreman of the Jury:"

It is, therefore, ordered and adjudged by the Court that the defendant, Samuel Johnson, a/k/a Samuel Bice Johnson be transferred forthwith to the Mississippi State Penitentiary at Parchman, Mississippi and placed in maximum security where he shall remain until October 22, 1982, on which date he will be put to death by the proper official by the method prescribed by statute.

ORDERED AND ADJUDGED this the 3rd day of September, 1982.

Filed September 3, 1982

Glen D. Fortenberry,
Circuit Clerk

/s/ J. D. Pittman
Circuit Judge

SUPREME COURT OF MISSISSIPPI

No. 55265

SAMUEL JOHNSON, a/k/a SAMUEL BICE JOHNSON

v.

STATE OF MISSISSIPPI

May 8, 1985

En Banc.

HAWKINS, Justice, for the Court:

On December 31, 1981, around two o'clock in the afternoon Mississippi Highway Safety Patrolman Billy M. Langham, while acting in line of duty, was murdered on U.S. Highway 49 in Covington County, at the city limits of Collins. He was stabbed with a butcher knife in the back between his shoulder blades, and shot at close range with his own revolver.

Samuel Bice Johnson, one of three men indicted for his murder, following a change of venue, was tried in the Circuit Court of Pike County for capital murder, sentenced to death, and has appealed. Two other men charged in the murder, Otis Lee Fairley and Charles Montgomery, Jr., following separate trials, have been convicted of capital murder, and each sentenced to life imprisonment.

We affirm.

There is no dispute but that Langham was murdered, but it was Johnson's contention at trial and on this appeal that the murderer was Anthony Fields, who con-

stituted the fourth culprit there at the scene of trouble with Patrolman Langham. Johnson has raised numerous issues on his appeal, which we will address. First, the facts.

FACTS

Anthony Fields and Otis Lee Fairley are first cousins. On December 31, 1981, they were staying together in New Orleans. Around 10:00 that morning the two of them were picked up by Samuel Bice Johnson and Charles Montgomery, Jr., in a 1971 Ford LTD with a yellow body and brown top, Johnson driving.

Fields had seen, but never met Johnson or Montgomery prior to that morning. Montgomery rode on the front seat with Johnson with Fields on the left and Fairley on the right side of the back seat. Their destination was Collins. Fairley was born in Collins and lived there until 1968. Fields was born in Gulfport, where he lived for 15 years and then moved to New Orleans. The precise purpose of their trip to Collins is not shown in the record. Fields's mother lived in Collins, having moved there three years previously; Fairley had two sisters living there; and they both had numerous kinsmen there. Fields never lived in Collins.

En route they stopped in either Lumberton or Purvis where Fairley had a sister.

They were traveling North on Highway 49, presently four lanes with a strip between the North and South bound lanes. There are several low hills as the highway approaches Collins from the South.

At approximately 1:30 that afternoon, as they were approaching Collins, they passed Highway Patrolman Billy M. Langham, parked in a Dodge patrol car, with a blue light on top and Highway Safety Patrol decals on its sides. Langham was in uniform, wearing his badge, and armed with a .357 caliber magnum Smith and Wesson revolver.

As they passed the patrol car, Langham started after the Ford with his blue lights blinking. Johnson pulled his car over on the right shoulder and Langham parked the patrol car just a few feet to the rear. Langham walked to the driver's side of Johnson's car and asked to see Johnson's license. Johnson replied he had no license and Langham told him to get out of the car.

The state's version of what then transpired came primarily from Fields, who testified that after Johnson got out of the car Langham noticed a butcher knife on the front seat. Langham picked the knife up, put it on top of the patrol car next to the blue light, and told Johnson to go to the back of his car.

Langham then came back to the Ford car and told the other three he was going to have to search them. They also got out of the car, Langham patted all of them lightly and told them to stand by his car. Fields noticed Johnson whispering to Fairley.

Langham then went to the Ford and searched the front seat. The officer then started the search of the back seat. As he was in the process of searching the back seat, Fairley got the knife off the top of the patrol car and gave it to Johnson. Then, as the officer straightened up from searching the back seat, Johnson stabbed him in the back.

When Fields was asked on direct examination why Johnson would stab the officer, he replied it was to escape.

Fields further testified that when Johnson stabbed Langham, the officer reached for his revolver. He said Johnson then changed hands and went for the revolver, also, and the two started tussling, and Johnson kept on stabbing the officer. Johnson yelled to Fairley to "come knock him out," and after several calls Fairley suddenly ran over and started hitting Langham in the face. Johnson then yelled for Montgomery to get the officer's gun. Montgomery, who was then standing close by the scuffle,

hesitated, and then suddenly reached and grabbed the gun. Montgomery then said, "I got it."

The scuffle began by the Ford and moved back towards the patrol car. The officer looked to Fields and said, "Help." Fields did nothing.

When Montgomery got the pistol, Johnson and Fairley both ran for the car. Montgomery remained standing there with the gun on the officer. Langham asked Montgomery, "Please don't shoot me." He asked this more than once.

Montgomery was holding the gun with both hands. He took one hand off to open the car door, and Johnson, who was under the steering wheel, told Montgomery, "No, shoot the m.....f....." Montgomery hesitated, and Johnson repeated the statement.

Montgomery then put both hands on the pistol and started walking towards the officer. Fields, by this time in the back seat of the LTD, dropped his head so as not to see, and heard a shot. He then heard Montgomery say, "I got him," and Montgomery got into the car. As Johnson drove off Montgomery threw the gun out the window. The record does not reveal from Fields testimony when he got back into the car.

Johnson cursed Montgomery for throwing the gun away, slowed the car down, but because there were witnesses approaching from behind, he did not stop.

As they were driving Johnson repeatedly said he had to find another car. He parked the Ford, and they all got out and ran for a railroad track. When they got on the track, they started walking towards town. Johnson removed the sweater he was wearing and threw it beside the track, which Fields described as brown. Johnson had no clothing under the sweater. Fairley removed his sweat suit to give Johnson his t-shirt, which Johnson put on.

They spotted a yellow Mercury Comet beside the track next to a building. Johnson inspected the car, found the keys were in it, and the four of them got into the car, Johnson driving.

Fairley got on the front seat with Johnson, and Montgomery and Fields got in the back. Johnson told Montgomery and Fields to lie down, which they did.

As they were traveling in the Comet, Johnson asked the others if they thought he did the wrong thing. Montgomery and Fairley said he did the right thing, and Johnson said he'd rather be dead than go back to jail.

The Comet ran a road block at the intersections of Highways 35 and 84 in Jeff Davis County. The officers on the scene shot the tires, and the Comet stopped. Fairley and Johnson ran from the car.

Fields got out with his hands up, and was arrested. Montgomery remained in the car and was arrested.

The officers pursued Johnson and Fairley on foot, and in a short distance caught and arrested them both.

Fields pleaded guilty to the crime of accessory after the fact and was sentenced to five years. He also received three 10-year sentences for guilty pleas to other crimes, two to run concurrent, one consecutively: a total of 25 years to serve. He testified as a witness for the State. He had no prior felony convictions. He had previously been charged with possession of a deadly weapon, assault, and possession of stolen property, and convicted of a misdemeanor, for which he served some time in jail.

On cross-examination Fields admitted to drinking on the way to Collins. The others smoked some marijuana. He said he stood by the front left tire of the patrol car while the scuffling was going on, and never touched Langham. He also testified that when he was questioned by an officer if Johnson did not pull the knife from his pocket he had answered "yes." He admitted he had forgotten

to tell the officers about Johnson removing the sweater until some time later, and when he did recall the incident he told his lawyer.

He said the first time he saw the butcher knife was when the officer put it on top of the patrol car. Until then he was unaware Johnson had a knife. He also admitted telling the officers Johnson had a coat on, but said Johnson had the coat on after Montgomery gave it to him.

For purposes of clarity in this opinion, we have given the testimony of Fields first, although he was the last person who testified in the case in chief for the State. We relate the remainder of the facts as told by the State's witnesses.

Andy Wade, a 12- or 13-year-old boy, was riding North on the highway and noticed passing a patrol car parked behind a yellow car, and a patrolman apparently searching the back seat area of the yellow car.

Andy Cochran and his niece, Mrs. Brenda Townsend Watson, wife of a highway patrolman, were two of the occupants of a car traveling South on the highway. They noticed the blue lights on the patrol car, slowed down, and observed the yellow Ford parked in front of the patrol car. They also observed three black men tussling with the patrolman. They saw the officer break away, and being grabbed by the three men. They observed the officer's arm being held behind his back, and blood between his shoulders running down his shirt. Three men were involved in the tussling. Mrs. Watson saw the officer being pushed down the embankment. They proceeded South to a place where they could cross into the Northbound lane of the highway, observing the affray as best they could. By the time they had turned around and got back to the scene, the yellow Ford had driven off. Cochran identified the yellow car as a Ford LTD. Cochran briefly examined the slain officer, and took off after the yellow Ford. They saw a deputy sheriff and reported

what had transpired. Neither Cochran nor Mrs. Watson was able to identify any of the individuals involved in the trouble. Mrs. Watson testified she did not see any person making an attempt to help the officer, or any person merely standing around, doing nothing.

Charles Dodds was driving North on the highway. As he approached the scene, he noticed at least three men pushing and shoving the patrolman between the cars and the right-hand ditch. At very first glance they appeared playful. He noticed one man with his arms around the patrolman. Dodds parked his car 60-75 yards from the scene. He noticed the patrolman either being pushed, or breaking away towards the ditch. He could not tell whether the scuffle was beside or in front of the patrol car. He noticed the patrolman taking about two steps towards the ditch as though trying to regain his balance. Either his back or side was to the men, and just as he finished his second step, another man, standing to the left of the man holding the officer, shot him.

Dodds reached and got his own gun and loaded it. By the time he raised up all but one of the men had got into the yellow car He saw the last man getting in on the right hand side.

On cross-examination Dodds testified that at one time it appeared the men were almost in a straight row. He noticed one of the men was huskier than the others, and he observed this man holding the officer. Johnson was not husky. Dodds did not observe any of the blacks standing around doing nothing.

Charles Hollingsworth, a first lieutenant in the Army, a graduate in criminal justice from Mississippi Southern University, and a former police officer in Hattiesburg, was traveling North on the highway when he first observed at least two people at the right rear of the Ford fighting with the patrolman. It seemed to him one person was holding the patrolman and two more were hitting him.

He stopped his car some thirty to thirty-five feet from the Ford and continued to watch. He was about to get out of his car when he heard a shot. There was no fighting going on when he heard the shot. He saw no weapon. Just before the shot was fired, it appeared the patrolman had been pushed back five or ten feet from the others. When Hollingsworth heard the shot, he dropped to his car floorboard.

When he raised up he observed men getting into the Ford. He could only identify Anthony Fields. His testimony as to what he observed Fields doing is ambiguous. On cross-examination he testified as follows:

Q. Coming down 49 you saw what appeared to be a scuffle, is that right?

A. There was a fight going on, yes, sir, it was.

Q. And you have said previously that there were at least two people involved, is that right?

A. That is correct.

Q. You also said that there could have been more people involved, is that right?

A. That is correct.

Q. Did you see those people?

A. I saw at least two people.

Q. Did you see more than two people?

A. There could have been more than two people.

Q. Did you see any more people?

A. I at least saw two in the view that I had from my car.

Q. Didn't see anyone else other than those two, is that right?

A. They were the two I saw intially, that's correct.

• • • •

Q. Did you tell Wade Parham in a telephone conversation that there could have been someone in the car?

A. I could have possibly said that. I don't remember saying it.

Q. But you're not denying it, is that correct?

A. I'd have to look at my testimony on my original statement.

Q. I hand you a copy of your transcript of the telephone conversation. I'd like to call your attention to—Mr. Parham asked you the question: "Did you see more than two blacks, Mr. Hollingsworth? And you said, "There were probably more than two but, you know, I only noticed two. There could have been more out of the car and there could have been one guy that was still driving? Did you say that?

A. It's in the statement. I guess I did say it.

Q. Thank you sir. When you first saw those people if there was a scuffle, the scuffle had already —if there was a stabbing that stabbing would have already taken place, is that right?

A. I cannot answer that.

Q. Did you see anyone stab the Highway Patrolman?

A. No, I did not.

Q. Did you notice whether the Highway Patrolman was hurt?

A. At what point in time?

Q. When you first saw him?

A. When I originally saw him I could not tell.

Q. Did you see anyone stab the Highway Patrolman?

A. No, I did not.

Q. Did you see anyone shoot the Highway Patrolman?

A. No, I did not.

Q. But you heard the shot, didn't you?

A. Yes, I did.

Q. Okay. Backing up just a short piece in time, when you stopped after you saw the scuffle you saw only two people, correct?

A. That's what I had in my statement, yes.

Q. Had there been more people out there they could have already gotten back in the car, is that correct?

A. That is a possibility.

Q. Okay. And you were able to identify one of those two people weren't you?

A. Yes, I did.

Q. Tell the people of the Jury who that man was?

A. I do not recall what his name was.

Q. Was it Anthony Fields?

A. I believe it was.

Q. Are you not certain?

A. I know I identified him; I don't remember what his name was.

Q. Would you like me to help you with your statement? It was Anthony Fields, wasn't it, and you identified him?

A. Yes, it was.

Q. He's the man that turned State's evidence, is that correct?

A. I believe so.

Q. You said he was a big one, he was husky, correct?

A. I believe I said that, yes.

Q. And you saw two people and then you heard the shot, is that right?

A. That's correct.

Q. Was Mr. Fields trying to help that police officer?

A. I don't know.

Q. He was fighting with that police officer, wasn't he?

A. He was one of the men I identified. I could not tell.

Q. You told the District Attorney's office that they were fighting with that police officer, didn't you?

A. Yes, I did.

Q. You did? So he was fighting with him, wasn't he?

A. I don't know if Mr. Fields was fighting with him, but I know—

Q. [INTERRUPTING] What about the two men you saw, were they fighting or just—

BY MR. EVANS:

If the Court please, I request that he be allowed to finish his answer before he asks another question.

BY THE COURT:

Yes. Let him finish his answer and then you may ask another question.

BY MR. DIAZ:

I beg the Court's indulgence.

A. Would you repeat the question, please?

Q. In your previous statement you said that you saw two black men, is that right?

A. That's correct.

Q. And you told in your statement that those two men were fighting with the Highway Patrolman? Is that correct?

A. That's correct.

Q. And you identified one of those two men as Anthony Fields, didn't you?

A. I identified one of the men that I could recognize as Anthony Fields, that's correct.

Q. He was one of the men fighting with the Highway Patrolman, wasn't he?

A. He could have been, yes.

Q. Okay. The man sitting right over there in the green suit, is he the other man?

A. I don't know.

Q. Take a good look at him.

A. I said I don't know. This all happened in a matter of some ten or fifteen seconds.

Q. Okay. To be certain that there's no confusion, this is not the man you identified, is it?

A. No, it is not.

Q. The man you identified was heavy-set and known to be Anthony Fields, correct?

A. That is correct.

[Vol. VIII, pp. 1319-1324]

Bennie Sasser was the final disinterested eyewitness for the State. He was a resident of Covington County, and traveling North on the highway. As he approached the parked vehicles, he noticed something unusual. He observed the patrolman jerk his arm up suddenly and that he was being hit in the back. He then testified [Vol. VIII, pp. 1326-27]:

> There were three, possibly four black men standing out there, and one black man was shorter and heavier-set that was doing the hitting in the back of the Patrolman. Then I observed the Patrolman got away from them, was pushed or something and he ran down the embankment, and about this time I was having to dodge a pickup that was in front of me, and I looked back and he was running back toward them. And as I swerved back around then I noticed that they were getting in their car, the car doors were open, and that's the last time I saw them . . . .

On cross-examination he testified that the husky man he observed hitting the officer in the back was not Johnson. He said it was possible that the man hitting the officer in the back could have been stabbing him.

The postmortem by Thomas Glen Puckett, Hattiesburg pathologist, revealed three wounds: a cut to the bone over the left eye and cheekbone; a 2-2½ inch long, 7-8 inch deep stab wound in the back below the shoulder blades extending into the lung cavity; and a stellate entrance gunshot wound about the level of the left eyebrow. This type of wound was indicative of a weapon

being fired at such close range that the gases from the discharging weapon also entered the victim. Langham's right eye was bulged out markedly as a result of gas from the weapon. The bullet traveled through the brain and lodged between the right rear exterior of the brain and skull.

The doctor testified that Langham was killed by the gunshot wound. He further testified that the stab wound, while serious, might not have been fatal, particularly if Langham could have received reasonably prompt medical attention; but on the other hand could have resulted in death within ten minutes.

Ballistics tests revealed the bullet removed from Langham's skull was fired by his own .357 caliber magnum revolver. This revolver and the butcher knife were found at the scene of the slaying. No fingerprints were recovered from either weapon. also, tests for powder residue from a discharged firearm were negative as to all four: Johnson, Montgomery, Fairley and Fields.

Following their arrest Johnson was observed as having a bad cut on his right palm, for which he received medical treatment.

Tests showed the bloodstains on the knife were Langham's. Also, bloodstains on various parts of the exterior of the yellow Ford were determined to be Langham's. Other stains were found to be blood, but the expert was unable to identify the precise type.

The sweater, which Fields called brown, and identified by all witnesses at trial as being white, was found by Lawrence Anderson, assistant chief of police of Collins, just off the railroad tracks in the area where Fields testified it had been thrown. Tests showed the bloodstains on the body of the sweater came from Langham, and bloodstains on the sleeve came from Johnson.

On clothing identified as belonging to Montgomery tests showed bloodstains of Langham.

No bloodstains were found on Fields's clothing.

Bloodstains were found on Fairley's clothing but not identified.

All the bloodstains on Johnson's clothing were of his own type.

Joe E. Andrews, Jr., an expert on hair and fiber identification employed by the Mississippi Crime Lab, testified there are three basic fibers: animal, plant and synthetic. From his examination of Johnson's clothing, he found gold synthetic fibers with the same characteristics as found on the sweater. Also, from an examination of Montgomery's clothing, he found gold synthetic fibers with the same characteristics as on the sweater. It is not clear from the record whether these fibers found on the sweater and Johnson's and Montgomery's clothing were part of the fabric of the sweater, or simply fibers that had become attached to the sweater. On cross-examination Andrews conceded it was possible that all three of these gold synthetic fibers could have come from some common source other than the sweater.

No such fibers were found on either Fairley's or Field's clothing, nor on Langham's clothing.

Johnson did not testify. The only eyewitness testifying in Johnson's behalf was Fairley, who gave an entirely different version of the affray.

Fairley testified that after Johnson stopped the car, Langham came over to the driver's side of the car and asked Johnson if he had a driver's license, and when Johnson replied "no," the officer told him to step to the back. He said the officer then came around to the passenger's side and asked Montgomery to get out, and step to the back of the car, following which the officer began searching the front passenger seat. After searching the front of the car, the officer told Fairley and Fields to get out of the car. He testified the officer did not find a

butcher knife on the front seat of the car, and did not put a knife on top of the patrol car.

He said the officer told them to "stand to the back." (Vol. XI, p. 1889) Further, he stood at the front end of the patrol car, and the other three were there standing along the side, by the front of the patrol car.

Fairley said the officer had begun to search the back seat of the car and Fields walked up and stabbed him, and that the first time he ever saw the knife or had any knowledge of it was when Fields stabbed the officer.

Fairley said Johnson then ran up and grabbed for Fields, he guessed, and got cut, and that he then ran to the car. He testified that Johnson screamed and cursed that he had got cut. Fairley said Montgomery came to the car next, and seconds later after Johnson got cut, he came to the car, also. He said Johnson tried to crank the car up and it wouldn't get started at first, but finally started, and then they heard a shot and Fields came to the car. Fairley said Fields had a white sweater on.

He did not know whether Johnson got the knife away from Fields or not, but the struggle lasted only seconds.

On direct examination Fairley testified he had been convicted of murder two times (apparently the last time was a conviction for Langham's murder), and twice for assaults, one with, and the other without malice.

On state cross-examination Fairley was asked the purpose of the trip to Collins, and the trial judge sustained the objection to this question.

Further, on cross-examination he testified when the officer was stabbed "we ran up to help the officer and that's when the struggle started. I ran to the car. He said his intention was to grab Fields and when Johnson screamed he ran to the car. He did not relate Montgomery as participating in the affray in any way, but when he ran back to the car Montgomery was there, also.

He said Fields held the officer, stabbed him and scared off the other three all by himself. And, Fields got in the car by the time Johnson got it started.

Further, on cross-examination Fairley said Fields gave Johnson directions to drive the yellow Ford, and they ended up down by the co-op and railroad track. He then testified Fields ran into the yellow Comet, and at this time Johnson and Montgomery were down the street. Fields got in the Comet and Fairley got in and they drove off to Johnson and Montgomery, who then got in. Fields drove just a short distance and said he was too nervous to drive, and asked Johnson to drive. He testified Johnson, with his hand bleeding, got out of the back seat and got in the front seat and started driving.

As to the white sweater which Fairley testified Fields was wearing, he said while they were on the tracks he asked Johnson and Montgomery to help him pull the sweater off. He could not remember how they pulled it off.

He said the reason the three of them did not grab Fields and overpower him was they were afraid, or had panicked.

He admitted that he had told his sister Rosa McCullen that Johnson stabbed the officer and Montgomery had shot him.

Dr. William Munn testified to treating two lacerations at the base of the thumb and little finger of Johnson's right hand, which had almost stopped bleeding at the time he was treating Johnson. Neither wound involved muscles or tendons. The doctor recalled stitches were put in one or the other of the wounds.

There were four jail house witnesses, two who testified for the defense, and two in rebuttal for the state. James Jenkins and Carl Lee testified that while they were in the Simpson County Jail they heard Fields admit to

Fairley he had lied to save himself from going to the gas chamber.

Norman Shelly in rebuttal testified he heard Fairley and Johnson talk about Fairley taking the knife and Johnson stabbing the patrolman. Danny Russell in rebuttal testified Johnson asked him to say that Fields had lied and tricked the state.

PART A.

LAW

GUILT/INNOCENCE PHASE

I.

WEIGHT OF THE EVIDENCE

Johnson's first contention is that the verdict of the jury is against the overwhelming weight of the evidence. Fields testified Johnson stabbed Langham and told Montgomery to shoot, drove the get away car, and led the group. Only Fairley disputed this, and he admitted that he had told his sister Johnson stabbed the officer and Montgomery shot him. The credibility of these witnesses was for the jury. Disinterested eyewitnesses, who saw varying brief time frames of the affray, were not able to specifically identify Johnson as doing anything to the officer during their respective moments of observation, and two recalled Fields under circumstances which would indicate he may very well have been more than an idle spectator, as he testified. There again, it was for the jury to accept the portions of Fields's and Fairley's testimony they wished to believe or discredit. This Court has long held, as stated in *Cochran v. State*, 278 So.2d 451 (Miss. 1973), citing *Wilson v. State*, 264 So.2d 828 (Miss. 1972):

> In a criminal prosecution, the jury may accept testimony of some witnesses and reject that of others, it may accept in part and reject in part the testi-

mony of any witness, or it may believe part of the evidence on behalf of the State and part of that for the accused. In other words, the credibility of witnesses is not for the reviewing court. *Bond v. State*, 249 Miss. 352, 162 So.2d 510 (1964).

It was the function of the jury to pass upon the credibility of the witnesses and to resolve the issues. Since there was ample evidence, which if believed by the jury, justified the verdict, the verdict will not be disturbed on appeal. *Murphree v. State*, 228 So.2d 599 (Miss.1969). (264 So.2d at 830). [Other citations omitted]

See also: *Dickerson v. State*, 441 So.2d 536 (Miss. 1983) at 538, citing *Gandy v. State*, 438 So.2d 279, 285 (Miss.1983); *Pearson v. State*, 428 So.2d 1361, 1364 (Miss.1983); and *Gathright v. State*, 380 So.2d 1276, 1278 (Miss.1980).

Significant is the testimony that both Johnson's and Langham's bloodstains were found on the sweater. Langham's bloodstains were found on Montgomery's clothing, and unidentified bloodstains were found on Fairley's clothing, but no bloodstains were found on Fields's clothing. Also, synthetic fibers from a common source were found on the sweater, Johnson's clothing and Montgomery's clothing. None was found on Fields's clothing.

The evidence for the jury was not limited to the co-indictee Fields. His testimony was corroborated by the bloodstain and fiber tests. Further, the only witness who directly disputed Fields was Fairley, and from this record his testimony is not convincing. Moreover, Fairley admitted telling his sister that Johnson stabbed, and Montgomery shot the officer. Johnson was indicted for capital murder in the death of a patrolman acting in his official capacity, with knowledge he was a police officer acting in his official capacity, in violation of Miss.Code Ann. § 97-3-19(2)(a).

There was a clear jury issue on Johnson's guilt, and we are not at liberty to disturb it.

II.

IMPROPER CLOSING ARGUMENT

Johnson contends there was prosecutorial misconduct in the closing argument. The district attorney made the opening and rebuttal arguments for the state, Johnson's two trial attorneys each made closing arguments in his behalf.

Prior to the circuit judge instructing the jury, defense counsel asked the court to permit them to delay making objections to closing argument until the state had concluded, and make such objections outside the jury's presence, so as not to interrupt the argument. Defense counsel also warned that they might object, in any event, "if something gets out of hand." The record reveals the following (Vol. XII, p. 1984):

BY MR. HARPER:

And, Your Honor, one other thing too, rather that —I don't know if we are going to want to make objections during the closing. What I'd like to do is, so that we not interrupt, is to ask to reserve our right to make objections until the closing is completed; and outside the presence of the Jury, make our objections at that time. Of course, if something gets out of hand, we will have to object at that point.

BY MR. EVANS:

That's very considerate of you. Thank you.

BY THE COURT:

Okay.

In the state's opening argument, the district attorney made the following statement (Vol. XII, p. 2058):

> . . . Samuel Johnson wanted to be the judge and the jury that day. He wanted to return the verdict and then he wanted to return the sentence, but today is a different day. Today is the day I've waited for a long time because besides being an officer, Billy was a friend. Today is the day that Samuel Johnson is going to answer to twelve jurors for his crime. Today is the day and y'all are the twelve.

When defense counsel Harper had concluded his argument, he made the following objection to the opening argument of the district attorney (Vol. XII, p. 2068):

> BY MR. HARPER:
>
> Your Honor, at this time the Defendant would object to Mr. Evans' statements concerning his personal relationship with the Deceased, stating that he was a personal friend of his. There is nothing of that into evidence at all before this Jury, and we also move for a mistrial on that basis. It improperly prejudices the Jury.
>
> BY THE COURT:
>
> Let the record be noted and I will caution Mr. Evans in the future.
>
> BY MR. HARPER:
>
> And my motion for a mistrial, then, is overruled?
>
> BY THE COURT:
>
> Overruled. Let the Jury come in, please.

No objections to the district attorney's argument were made until he concluded. Among his remarks objected to were the following [his rebuttal concluded (Vol. XII, p. 2125)]:

> . . . Like I said a minute ago, I pray to God that he gives you the wisdom to see through this and to see Samuel Johnson for the murderer he is because there

> ain't nothing else I can do but pray about it now. If he does give you that wisdom and if he gives you that strength of conviction and if he gives you that courage, you're going to find this man guilty of capital murder. Thank you.

The district attorney opened his rebuttal argument with the following comment (Vol. XII, p. 2112):

> I've been a lawyer since 1975, which ain't a long time to a lot of folks, I guess, but since then I've tried an average of one case a week, which makes a little better than three hundred cases. I'm going to tell y'all and everybody here and Mr. Diaz that I have never heard such blatant, arrogant disregard for the truth and patronizing tones that I've just heard from what you call a closing argument, and I'm not going to dignify the majority of it with an answer, . . .

At the conclusion of the district attorney's argument, defense counsel made the following objections, followed by a motion for a mistrial, which was overruled (Vol. XII, p. 2127-2129):

> BY MR. DIAZ:
>
> Your Honor, we have three objections to Mr. Evans' closing argument, the first being that he made a personal comment, "Pray to God," based on personal belief. It violates, Your Honor, the Fourteenth Amendment and the Eighth Amendment.
>
> Your Honor, the second reason is personal attacks on myself. He called me a liar. It violates my Eighth Amendment, Fourteenth Amendment, and Mr. Johnson's Sixth Amendment.
>
> I also object to him making the comment that Mr. Johnson didn't want to go back to jail, and I would like to move for a mistrial.

BY THE COURT:

Let the motion for a mistrial be overruled and let the record show that this was at the conclusion of the case, and the attorneys agreed that they would not make objections during the argument and it kind of binds the hands of the Court.

BY MR. ROBERTS:

I want to make a statement into the record too. I think that Mr. Evans' conduct was extremely commendable considering Mr. Diaz's comments from the Bible, which counteracts Mr. Evans' "Pray to God," and also Mr. Diaz' [sic] comments about cheap tricks imposed by the District Attorney. I want that in the record.

BY THE COURT:

Of course, the full record is—

BY MR. ROBERTS:

Yes, sir.

BY THE COURT:

—in the record.

BY MR. ROBERTS:

Yes, sir, I just want to make those comments too.

BY THE COURT:

Yes, sir.

BY MR DIAZ:

Thank you, Your Honor.

Trial was held from August 30 through September 3, 1982.

On October 11, 1982, Johnson's trial counsel filed a nine-page motion for a new trial, assigning twenty-nine

reasons why it should be sustained. The fifteenth assignment reads as follows (Vol. XIII, p. 2308):

> 15. The closing argument of the District Attorney in the guilt/innocence phase of Petitioner's trial, was inflammatory, included statements unsupported in the record, and contained a personal attack against Petitioner's trial counsel. The District Attorney accused defense counsel of fabricating evidence on Petitioner's behalf. The argument, in its entirety, was extremely prejudicial to Petitioner and violated his constitutional rights to due process and a fair trial as guaranteed by the laws and Constitution of the State of Mississippi and the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

On October 12, 1982, the circuit judge entered an order relieving the trial counsel Gerald Diaz, Jr., and Gregory Harper, and appointing Kenneth J. Rose to represent Johnson on appeal and in future proceedings. This attorney filed a supplemental motion for a new trial on August 29, 1983, assigned seven additional grounds for a new trial, making no mention of the district attorneys argument. Thereafter, on August 31, 1983, counsel filed a second amended motion for a new trial assigning two additional grounds, one of which pertained to the district attorney's argument (Vol. XIV, pp. 2511-2512):

> During the closing argument, the prosecutor connected the evidence of Otis Lee Fairley's prior trial and conviction to Samuel Johnson's case. "This case has been in my office since December the 31st, 1981. I've tried similar cases, two other similar cases, and it's a good thing they didn't ask me what I saw; because I see right now what you do, a murderer. Thats [sic] all. . . . I see a man fighting for his life against the likes of Charles Montgomery and Otis Fairley and Samuel Johnson, convicted murderers . . . I've tried two other cases just like this and I've

seen what they've tried to do two times before this and I've seen what they've got away with and I see it here and it makes me mad and there ain't nothing I can do about it but pray to God that y'all see through it." (T. Trial at 1622, 1626, 1627). There was no evidence presented of prior murder convictions of Samuel Johnson or Charles Montgomery.

On his appeal, Johnson's counsel has found further statements objectionable.

We must first observe that the state and defense counsel should be given wide latitude in their arguments to a jury. This is inherent in, and indispensable to, our adversary system. Courts should be very careful in limiting the free play of ideas, imagery and the personalities of counsel in their argument to a jury.

We next observe it is the duty of a trial counsel, if he deems opposing counsel overstepping the wide range of authorized argument, to promptly make objections and insist upon a ruling by the trial court. The trial judge first determines if the objection should be sustained or overruled. If the argument is improper, and the objection is sustained, it is the further duty of trial counsel to move for a mistrial. The circuit judge is in the best position to weigh the consequences of the objectionable argument, and unless serious and irreparable damage has been done, admonish the jury then and there to disregard the improper comment. See: *Wilson v. State*, 234 So.2d 303 (Miss.1970) at 308; *Aldridge v. State*, 180 Miss. 452, 177 So. 765 (1938) at 456; *Matthews v. State*, 148 Miss. 696, 114 So. 816 (1927) at 701.

Defense counsel chose not to follow this familiar path, but to wait until the conclusion of the argument to object. This is quite illogical and extreme, and places the state in a "Catch 22" situation. To allow defense counsel to argue at conclusion of argument, to which no objection has been made, he is then entitled to a mistrial

is not only inviting error, but also preventing the trial judge from taking the one step he could have taken to remove the possibility of prejudice. We cannot countenance assigned errors based on this sort of a proceeding.

There was not a single statement made by the district attorney, which, even if there were impropriety, could not have been immediately corrected by an objection being sustained, and an admonishment by the court.

Moreover, we have studied the entire argument of the prosecuting attorney. He perhaps made statements he should not have, strong. He was not complimentary of defense counsel. Neither was defense counsel complimentary of the district attorney. It is a common tactic, in one way or another, to diminish your adversary's case by reflections on his attorney. If it becomes too blatant, an objection should be sustained.

The complaint of the prosecution's argument include calling upon the Deity, making reference to the personal friendship of the district attorney and the victim, personal remarks directed to defense counsel, personal belief in Johnson's guilt, and frustration in prosecuting these cases. Every one of these complaints could have been quickly dissipated by a contemporaneous objection and ruling by the circuit judge.

Moreover, no appellate court would be warranted in reversing this case on the basis of the argument made by the district attorney.

III.

REFUSAL OF A CONTINUANCE

Johnson was indicted January 18, 1982. On March 1, 1982, the circuit judge entered an order specially setting the cause for trial July 13, 1982, in the Circuit Court of Covington County. On June 3, 1982, Johnson made a motion for a change of venue. On June 21,

1982, the circuit judge entered an order sustaining the motion, transferring the cause to Pike County, and setting the cause for trial August 30, 1982.

The record in this case reveals thorough and aggressive defense counsel. At least thirty pre-trial motions of one kind or another were made.

Inexplicably, defense counsel waited until August 30, 1982, to file a motion for a continuance on the ground two witnesses purported to be "forensic scientists" would be "out of the country" for the week beginning August 30. The motion further stated these witnesses had viewed all the evidence and prepared extensively from a "scientific point of view," and would be called as witnesses in the defendant's case in chief. Johnson filed no affidavit with the motion. Defense counsel Diaz attached an affidavit to postpone the trial thirty days in order to study the trial transcripts of trials of Montgomery and Fairley, which stated nothing, however, about the absent witnesses.

On August 18 there was a colloquy with the court about these witnesses, the circuit judge stated he had no knowledge as to what they would testify, and got a general answer they were experts and would help defense counsel try the case.

This motion contained almost none of the essential ingredients we have consistently required under Miss. Code Ann., § 99-15-29 (1972) to justify a continuance of a cause. It was also contemptuous of the obligation every trial counsel owes a court to wait until ten days before the pre-determined trial date to inform the circuit judge of the unavailability of these two witnesses, as shown by the facts in this particular case.

This assignment of error is frivolous.

IV.

LIMITATION OF CROSS EXAMINATION OF FIELDS

Prior to his death, Patrolman Langham had killed a black man. The state made a motion in limine to prevent Fields from testifying to this fact, which the circuit judge sustained. (Vol. V, p. 775)

The mere fact Langham had previously killed a black man in and of itself had no relevancy to this case. In order to make evidence of this fact competent in this case it was incumbent on the defense to in some manner demonstrate its relevancy.

No attempt was made to do so either before or during trial. It was not error, therefore, for the court to sustain the motion.

In Johnson's hearing on his motion for a new trial, conducted September 18, 1983, approximately one year following his trial, the circuit judge was presented with the following affidavit executed by Fairely on September 15, 1983 (Vol. XIV, p. 2520):

> Before me the undersigned authority personally appeared Otis Lee Fairley who after being duly sworn deposes and says:
>
> My name is Otis Lee Fairley. I grew up in Covington County. Anthony Fields is my first cousin, my father and his mother are brother and sister. Anthony Field's mother has lived for the last several years in Collins, Covington County, Mississippi.
>
> At Samuel Johnson's trial, I was not allowed to testify to a conversation between Anthony Fields and I in the Simpson County Jail in January, 1982, at which time he told me that the Highway Patrolman, Billy Langham, had murdered a black person in Jeff Davis County Ten (10) months before we were stopped. I asked Anthony Fields why he had to kill the Highway Patrolman instead of just coming to

> the car. He told me that he knew the Highway Patrolman had murdered a black person and that if he let him go he thought the Highway Patrolman would go for his gun and kill us before we could leave.

On appeal Johnson argues he was prevented from introducing the *statement* allegedly made by Fields to Fairley as to why he, Fields, shot Langham. No such attempt to introduce such statement was ever made, by asking either Fields or Fairley if it was made. Had defense counsel done so, we would have an entirely different question on competency.

In looking at this record, we could not believe the state would have objected to the admissibility of this statement for either evidentiary or strategic reasons. The concluding sentence of this affidavit as a reason for killing Langham is nonsensical.

It is worth noting that during trial Fairley was given the opportunity on cross-examination to answer why Fields would have shot Langham, but only stated: "He knew all the officers from Covington County." (Vol. XI, p. 1908) There is no merit to this contention.

V.

INSTRUCTION ON CAPITAL MURDER

Johnson argues the court's instruction failed to embrace the statutory requirements of murder and capital murder, and also to require the state to prove intent on his part to commit murder. See: Miss. Code Ann. § 97-3-19(1)(a), and (2)(a).

Instruction C-7 reads in pertinent part (Vol. XII, pp. 1989-1990):

> The defendant, Samuel Johnson, has been charged by an indictment with the crime of capital murder for having wilfully, unlawfully, feloniously, of his malice aforethought and without authority of law kill

> and murder Billy Morris Langham, a human being, and that the said Billy Morris Langham was a peace officer at the time of the alleged murder, and that at the time of the alleged murder, Billy Morris Langham was acting in his official capacity as a peace officer, and that at the time of the alleged murder the defendant, Samuel Johnson, knew that Billy Morris Langham was a peace officer acting in his official capacity.
>
> If you find from the evidence in this case beyond a reasonabely [sic] doubt that:
>
> 1) The defendant, Samuel Johnson, aided and commanded Charles Montgomery to commit capital murder by stabbing Officer Billy Morris Langham with a knife and ordering Charles Montgomery to shoot Officer Billy Morris Langham; and
>
> 2) That Charles Montgomery wilfully, unlawfully, feloniously and of his malice aforethought and without authority of law kill and murder Billy Morris Langham a human being, by shooting said Billy Morris Langham with a .357 Magnum pistol; and
>
> 3) That Billy Morris Langham was a peace officer, to-wit: a member of the personnel of the Mississippi Highway Patrol; and
>
> 4) That Billy Morris Langham was acting in his official capacity as a peace officer at the time of his death; and
>
> 5) That the defendant, Samuel Johnson, then and there had knowledge and knew that the aforesaid Billy Morris Langham was acting in his official capacity as a peace officer aforesaid; and
>
> 6) That said killing and murder of Billy Morris Langham occurred on the 31st day of December, 1981 in Covington County, Mississippi.

then you should find the defendant, Samuel Johnson, guilty of capital murder, and the form of your verdict may be:

> "We, the jury, find the defendant, Samuel Johnson, guilty of capital murder."

If you find the State has failed to prove any one of the essential elements of the crime of capital murder, you must find the defendant not guilty of capital murder and you will proceed with your deliberations to decide whether the State has proved beyond a reasonable doubt all the elements of the lesser crime of murder less than capital.

It can be readily observed that the first part of C-7 requires intent on the part of Johnson to kill Langham, and knowledge that he was killing a peace officer acting in his official capacity. The following paragraph with its six sub-parts clearly define the acts necessary to come within the capital murder framework. The jury could not have been misled by this instruction. It was never the contention of Johnson, either in the circuit court or on appeal, that the slaying of Langham was not a capital murder. His defense was he had nothing to do with the slaying. We do not have the situation of two parties engaged in a felony, and one without the actual knowledge or consent of the other committing a murder, also. The authorities cited by Johnson are inappropriate.

Moreover, defense counsel approved these instructions by the circuit court. *Williams v. State*, 445 So.2d 798 (Miss.1984) at 807; *Rayburn v. State*, 312 So.2d 454 (Miss.1975) at 455; Rule 42 Miss.Sup.Ct. Rules.[1]

[1] The state's only answer to this assignment of error in its brief was that it was waived. We have also addressed the assignment on its merits.

While the state is correct the point was waived, we think a word of caution is in order. When the state fails to answer an assignment of error on the merits, and rests its case with the contention

VI.

EVIDENCE OF PLEA AND SENTENCE OF STATE'S WITNESS

During the state's questioning of Fields, it was brought out that he pleaded guilty and had been sentenced to twenty-five years for his part in this crime. In closing argument the district attorney argued that it was necessary to do this to bring the parties responsible for the officer's death to justice.

The language of this Court in *Buckley v. State*, 223 So. 2d 524 (Miss.1969), under unusual facts has been the basis for numerous assignments of error. It is time we distinguish *Buckley* from the usual case.

Let us take the ordinary case in which two or more people are charged with the commission of a crime, and it is necessary that one of the participants in the crime testify for the state in order to make out a case against any of them. Frequently, the state will choose the person whose participation is not as great, or whose guilt is not as reprehensible, or who has readily confessed. Generally speaking, there are good, and at times compelling reasons for the state's choice among those accused to be the witness for the state.

It is not the function of the court, however, to tell the state which witness among the accused persons to select as the witness for the state. It is the right of the state to select which witnesses it deems proper to testify on its behalf.

While it is the sole responsibility of the circuit judge to sentence each accused who has been convicted or pleaded guilty, it is not improper for a circuit judge to take into consideration in his sentencing that such per-

the point has been waived, it places itself in some jeopardy. We do not know whether in so doing the state is conceding that if the point in fact was not waived, it is meritorious.

son is cooperating with, and will be a witness for the state in the prosecution of other defendants.

A co-conspirator, co-defendant or co-indictee who has been thus favored, however, is a marked man before the jury. There is a big question mark placed upon his testimony by the law, and indeed the accused on trial is entitled to an instruction that his testimony is to be viewed with caution.

One of the best weapons for defense counsel to further arouse the distrust of the jury in the testimony of such witness is to ask him on cross-examination, whether he has been sentenced or not for his participation, and if so, the sentence he has received. Invariably, if he has been sentenced, it will be much lighter than the sentence the man on trial can receive and, if he has not been sentenced, defense counsel can exploit even more the weakness and untrustworthiness of the testimony from such a witness.

These observations are to point out that in the ordinary case, if the state did not on direct have such witness testify as to his plea of guilty and sentence, defense counsel on cross-examination most assuredly would. Indeed, defense counsel would be derelict in his duty to his client not to point this out to the jury, so as to show a very special interest the witness has in his own testimony.

In closing argument, defense counsel has no better weapon to demonstrate the weaknesses of such testimony, the disparity of the sentence received by the state's witness, and the sentence which the court can inflict upon his client. Indeed, even though the state brings out on direct examination the plea of guilty, defense counsel invariably will further exacerbate the state's problem on cross-examination of such witness and hammer away at the disparity in treatment in final argument.

What harm has resulted, then, by the state making this concession in its examination in chief?

In the ordinary case, none.

Buckley presented a special set of facts. Buckley and one Billy Roy Pitts were indicted for kidnapping. At Buckley's first trial, Pitts testified as a witness for Buckley, corroborating Buckley's testimony. This trial ended in a mistrial when the jury failed to reach a verdict. Prior to the second trial, Pitts pleaded guilty to the charge, and at Buckley's second trial testified as a witness for the state. His testimony in the second trial corroborated the testimony of the kidnap victim, and contradicted Buckley's.

Over the objection of Buckley, the state was permitted to prove Pitts had pleaded guilty and then sentenced to serve five years. We found this to be reversible error there because proof of the plea of guilty *over Buckley's objection* had the effect of bolstering the testimony of an admitted perjurer. We stated:

> Appellant assigns as error the action of the trial court in overruling his objection to that part of the testimony of Pitts wherein he testified that he had been jointly indicted on the charge of Kidnapping Jack Watkins and that he had plead guilty to that charge, and as a result of his plea of guilty, had been sentenced to serve a term of five years in the state penitentiary. The overruling of this objection and admission of this testimony was reversible error. The law is well settled in this state that where two or more persons are jointly indicted for the same offense but are separately tried, a judgment of conviction against one of them is not competent evidence on the trial of the other because such plea of guilty or conviction is no evidence of the guilt of the party being tried. *State v. Thornhill*, 251 Miss. 718, 171 So.2d 308 (1965); *Pieper v. State*, 242 Miss. 49, 134 So.2d 157 (1961); *Pickens v. State*, 129 Miss. 191, 91 So. 906 (1922). Not only was this testimony designed to lead the jury to believe that since Pitts had

> plead guilty to the charge, that his co-indictee, Buckley, was also guilty, but it was also designed to bolster the testimony of Pitts. On the first trial of this case Pitts testified and his testimony in that trial corroborated Buckely's version of what happened. On this trial he testified directly contrary on the crucial issues. The state was aware that the evidence that Pitts had plead guilty to the same charge since the former trial would add weight to his testimony. It had the effect of bolstering the testimony of an admitted perjurer. [223 So.2d at 527-528]

The *Buckley* rationale is not present in this case. Indeed, defense counsel made no objection to the state's elicitation in its direct examination of Fields that he had pleaded guilty and been sentenced for his part in the crime. Defense counsel had excellent reason not to object, this was a fact very much in Johnson's interest with which to acquaint the jury.[2]

We do not overrule *Buckley*, but neither do we extend its holding beyond the unusual situation of that case. If defense counsel under some unusual case wishes to withhold from the jury the fact that a co-indictee testifying for the state has pleaded guilty and received a lesser sentence, he has a duty to object to the testimony offered by the state. This duty is more compelling in a case of this sort than in the usual case in which we have held that failure to object to testimony waives any assignment of error on appeal.

To permit this defendant to say nothing at trial, and complain for the first time in post-trial proceedings presents a classic case of having your cake and eating it, too.

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[2] It is interesting that in this case one of the pre-trial motions was to require the state to disclose any agreement it had made with any prosecuting witness that would influence his testimony, because such agreement would affect the credibility of the witness, and the "trial jury is entitled to know it." [Vol. II, p. 262]

VII.

REFUSAL OF INSTRUCTION

Johnson complains of the circuit judge's refusal of requested Instruction D-15 (Vol. XII, pp. 2025-2026). This instruction would have authorized the jury to separately consider whether he was guilty or not of the crime of being an accessory after the fact.

No authority is cited in support of this contention, and it is without merit. Johnson was on trial for capital murder, and he was entitled to instructions fully embodying all the elements of this crime, and further that in the absence of proof such elements, he was entitled to an acquittal. He was not entitled, however, to have the jury separately instructed and separately to consider whether or not he was guilty of being an accessory after the fact. See: *Wilcher v. State*, 455 So.2d 727 (Miss. 1984).

SENTENCING PHASE

VIII.

DENIAL OF FUNDS FOR OUT-OF-STATE WITNESSES

The record reveals that on motion by defense counsel, the court awarded expenses to counsel to travel to New York and interview prospective witnesses.

On August 28, 1982, defense counsel filed a motion for compulsory process and attendance fees, as well as travel expenses, for twenty-one prospective witnesses. Attached to the motion is an appendix summarizing the content of their knowledge of Johnson. From the summary of their proposed testimony, it is clear they were character witnesses.

While under the holding of the United States Supreme Court in *Eddings v. Oklahoma*, 455 U.S. 104, 113-115, 102 S.Ct. 869, 876-877, 71 L.Ed.2d 1 (1982), it might

have been proper in the sentencing phase of the trial to have such witnesses testify on Johnson's background, that case is not authority for the proposition that a state is required to furnish travel expenses for out-of-state prospective character witnesses. Moreover, the State of Mississippi is without authority to compel the attendance of out-of-state defense witnesses in a criminal case. See: *Diddlemeyer v. State*, 234 So.2d 292, 295 (Miss.1970). Under Article 3, Section 26 of our Constitution an accused is entitled to compulsory process for witnesses in his favor. The state's only power, however, is to reach witnesses within the state.

In any event, before a circuit judge should be criticized, defense counsel at a minimum, was under a duty to furnish detailed statements in affidavit form from each of these proposed witnesses as to what their testimony would be in the trial of the case. In this case the only thing presented to the circuit judge was a summary by counsel, not sworn to, as to what these witnesses might testify.

IX.

IMPROPER ARGUMENT IN SENTENCING PHASE

In complaining of improper argument of the district attorney during the sentencing phase, Johnson contends the state led the jury to believe if he were sentenced to life, he would eventually be paroled. Pertinent parts of the argument for the state and defense are as follows:

CLOSING ARGUMENT ON BEHALF OF THE STATE

BY MR. EVANS:

> Now, what you're considering is serious business. It's about as serious as it gets in our law and in our lives. And a lot of good-hearted and well-meaning people who don't understand the purpose and the

> necessity of capital punishment will probably say that I'm very cold and harsh and cruel when I stand here and I say that because of having been convicted of second degree assault with intent to commit first degree rape and capital murder that Samuel Johnson should die. . . . [Vol. XIII, p. 2276]
>
> • • • •
>
> This makes the tenth time that I have either tried or prepared for trial a capital murder case, and if Mr. Johnson's lawyers argue like all those others I've been involved in, they'll ask you for mercy, they'll ask you for compassion; and they'll ask you for compassion, if they're like the others and tell you that Samuel Johnson doesn't want to die. Billy didn't want to die either. And if they argue like the others, they'll ask you for mercy and plead for Samuel Johnson's life. Billy plead for his life. But mercy wasn't in the heart of Samuel Johnson last New Year's Eve when he told Charles Montgomery twice to shoot. . . . [Vol. XIII, p. 2277]

CLOSING ARGUMENT ON BEHALF OF THE DEFENDANT

BY MR. HARPER:

> . . . The only thing I'm here to do right now is to ask you to spare his life. And Mr. Evans is right, I am getting up here asking for mercy. I am asking you to spare his life.
>
> I want you to remember what Dr. Fisher said. And on this Instruction, PS-2, that Mr. Evans has referred to, there are several things that you are to consider as mitigating circumstances. I want you to study this instruction when you get back there and I want you to remember what Dr. Fisher said, that he can function in prison with that life sentence and not be violent. [Vol. XIII, pp. 2279-2280]
>
> • • • •

I ask you to study the instruction here and remember those things, and I ask you to think about what it's going to be like if he goes to the gas chamber, what it will be like there, and I ask you to spare his life. [Vol. XIII, p. 2281]

FINAL CLOSING ARGUMENT ON BEHALF OF THE STATE

BY MR. EVANS:

I can tell you what it's like. It's a gray room all the way around about like this and there's a bench in it and under that bench, there is a pail of water and above that are two pills, and the Sheriff pulls the handle that drops those pills into water. Then Sam Johnson will take a deep breath and in five to ten seconds his life will be ended. There will be no pain, there will be no agony, there will be no suffering. He won't feel a knife in his back and he won't feel a bullet exploding in his brain. And that's what it's like.

Dr. Fisher said that Samuel Johnson can adapt to prison life. My first response was that we're not here to see how Sam Johnson will adapt to prison life. What concerns me is what is going to happen the next time he decides to commit a second degree assault with intent to rape and what is going to happen the next time he decides he wants a Highway Patrolman or another law enforcement officer dead. You heard Dr. Fisher's testimony that inside prison his potential for violence was low, but outside, it was high. I just can't get concerned about how he would adapt to prison life when I know that his potential for dangerousness on the outside is high. [Vol. XIII, p. 2282]

• • • •

. . . [W]e have a system that really does work after all. And, as I told you before, I will now, in the name of that system and the decent, law-abiding

people in Mississippi, and by the authority that the ones in the Thirteenth District gave me, I'm going to ask that you retire and come back in a little while and tell Judge Pittman by your verdict, yes, we find that the aggravating circumstances do outweigh the mitigating circumstances we find that a man who commits second degree assault with intent to commit first degree rape and a man who has been returned to the penitentiary again and again and again, spent 10 of the last 18 years in the penitentiary, and a man who has a high potential for hurting other people and a man who has taken an innocent life when he killed an officer while that officer was enforcing the laws of our good people, has chosen himself to forfeit his life in the eyes of God and in the eyes of our law. You are not the one executing Samuel Johnson. Regardless of what they tell you, you're not the one. He chose that himself when he decided to be a criminal in 1963. So, as I said, I now ask you to retire and return shortly and tell Judge Pittman that the aggravating circumstances outweigh the mitigating circumstances and because of that, Samuel Johnson should suffer the penalty of death. [Vol. XIII, p. 2287]

In *Hill v. State*, 432 So.2d 427, p. 439 (Miss.1983); and in *Wiley v. State*, 449 So.2d 756, p. 761 (Miss. 1984), we condemned an argument which intimated to the jury that their decision "was not the last word."

In *Wiley*, we likewise disapproved an argument by the prosecution which stresses that any sentence to life imprisonment inevitably means parole for the convicted person, rather than having to serve his entire life in prison.

It is clear from the argument from the prosecution in this case that the district attorney never reached the type of argument which we condemned in *Hill*, supra, or in *Wiley*, supra. The argument made was in answer to the argument of defense counsel, and was fair argument.

In addition to this, defense counsel made no objection whatever to the argument by the state. As we have stated many times, and again in *Hill*, we are not obligated to review any assignment of error for closing argument in which there was no objection made during the trial.

We have carefully reviewed the entire argument by the state and defense counsel, and we find no reversible error for any statement made by the prosecution.

X.

SENTENCE NOT DISPROPORTIONATE

It is the duty of this Court under Miss.Code Ann § 99-19-105(3)(c) to review the proportionality of every death sentence. We also have this responsibility under decisions of the United States Supreme Court, as well as our own. See: *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Billiot v. State*, 454 So.2d 445 (Miss.1984); *Dufour v. State*, 453 So.2d 337 (Miss.1984); and *Neal v. State*, 451 So.2d 743 (Miss.1984).

Under the facts of this case, the jury was warranted in believing Johnson an active participant, if indeed not the leader, in a deliberate, brutal slaying of a peace officer carrying out his duties. In the absence of the abolition of the death penalty, no appellate court is justified in holding that the jury, having found Johnson guilty, could not also return a death penalty verdict under these facts.

The very word "murder" embraces within its meaning cruelty, brutality and an evil intent carried to the ultimate in harm: death. It is redundant to characterize a murder as cruel, brutal or malicious.

Civilized society must place its dependence on peace officers. They preserve the peace, protect us from harm,

and pursue the wrongdoer. They are the front line infantry in society's eternal struggle with crime.

The murder of a police officer in the line of duty must be equated with treason or espionage in time of war. Such a crime warrants the most severe punishment society exacts.[3]

We are not persuaded by Johnson's first argument that his case comes under the proscription of *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). That case involved a defendant who was a participant in a robbery, but who had nothing whatever to do with the slaying of the robbery victims.

Nor, is there any merit to Johnson's second argument that because Fairley and Montgomery in separate capital murder trials received verdicts of life imprisonment from the juries, Johnson could only be sentenced to life. See: *Bullock v. State*, 391 So.2d 601, pp. 612-614 (Miss.1980).

XI.

PRECLUSION OF EVIDENCE OF SENTENCES OF CO-DEFENDANTS

Somewhat more troublesome is Johnson's argument that the circuit judge erred in excluding from consideration by the jury during the sentencing phase that the juries trying Fairley and Montgomery had rendered life sentence verdicts. Clearly, under *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), Johnson was entitled to have his trial jury consider "any relevant circumstance."

Were the life sentences of Fairley and Montgomery *relevant mitigating circumstances?*

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[3] It follows this case is not disproportionate to the sentences imposed in other capital murder cases. See "Appendix A" for cases considered by this Court in this case.

We must hold they were not. Suppose, for example, the juries which tried Fairley and Montgomery had returned death penalty verdicts? Would the state, under any theory, have been permitted to show this over Johnson's objection? Each case tried by a separate jury must stand on its own. Otherwise, the jury trial is pointless.

Moreover, for the separate sentences of Fairley and Montgomery to have had any meaning in Johnson's, it would have been necessary to develop all the facts of each of their trials for this jury.

Johnson cites two Florida cases, both of which are distinguishable. In *Messer v. State*, 330 So.2d 137 (Fla. 1976), the Florida Supreme Court held the trial court erred in excluding from consideration by the jury during sentencing phase the plea bargained second degree murder sentence received by a co-defendant. As we stated, supra, Johnson in this case was clearly entitled to have the jury know and consider the guilty plea and sentence of Fields. This is quite different from the convictions of Fairley and Montgomery.

Slater v. State, 316 So.2d 539 (Fla.1975), involved a circuit judge overruling a jury recommendation of life imprisonment and imposing the death sentence, a procedure authorized under the Florida statutes. The Florida Supreme Court in turn overruled the circuit judge's imposition of the death sentence, the main reason being that an equally culpable defendant had been authorized to plead *nolo contendere* to first degree murder and received a life sentence.

Thus, it is clear the Florida cases have no application to this case.

XII.

SENTENCING INSTRUCTION PS-2

Johnson's first complaint on this instruction is that it did not provide a "principled basis for distinguishing this

case from the many other murder cases in which the death penalty was not imposed under the statute." His supporting argument is somewhat amorphous, nebulous, which we would be inclined to ignore in a less somber case. As we construe it, he argues that including as an aggravating circumstance his 1963 conviction of assault to commit rape did not channel the sentencing jury's discretion by "clear and objective standards."

We note that Miss.Code Ann. § 99-19-101(5)(b) authorizes the sentencing jury to consider as an aggravating circumstance, "the defendant was previously convicted . . . of a felony involving the use of threat of violence to the person." Contrary to Johnson's assertion, this is a clear and objective standard, fulfilling the guidelines of the United States Supreme Court in *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), and as further stated by *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983); and *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

It is not the purpose of Federal appellate review to deny to the states the authority to and responsibility for determining the aggravating circumstances which justify a death penalty. *Gregg v. Georgia*, supra; *Zant v. Stephens*, supra; *California v. Ramos*, supra; and *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976).

Nor is it the function of this Court to curtail this authority vested in our legislature. We cannot say the legislature had no constitutional authority to include this as an aggravating circumstance in a death penalty case.

Johnson further claims, without citing authority, that the conviction was too remote in time to be considered as an aggravating circumstance. Again, we are not prepared to deny the legislature had the power and lawful authority to include this aggravating circumstance in the

instruction on the facts in this case. We note the circuit judge wisely and humanely permitted Johnson to include in the instruction as a *mitigating circumstance* the remoteness in time of this conviction. Johnson was thus permitted to argue to the jury the point he asserts here, and in this argument he had the approval of the court's own instruction. Cf. *Zant v. Stephens*, supra; *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

Nor do we find merit in Johnson's next contention that the record does not support a consideration by the jury as an aggravating circumstance that Johnson committed the murder for the purpose of avoiding arrest.

Finally, he argues the record does not support a jury consideration whether the murder was especially heinous, atrocious and cruel. But, see: *Booker v. State*, 449 So. 2d 209 at 220-221 (Miss.1984); *Caldwell v. State*, 443 So.2d 806 (Miss.1983) at 814-815; and *Irving v. State*, 441 So.2d 846 (Miss.1983) at 849-850.

JOHNSON'S SUPPLEMENTAL BRIEF

Johnson filed a supplemental brief containing seven additional assignments of error.

XIII.

WAS THERE A DISCOVERY VIOLATION?

Simpson County Jail inmate Norman Shelly was called by the state as a rebuttal witness at the guilt phase of appellant's trial. [Vol. XI, pp. 1928-1930] Shelly testified he overheard a conversation between Johnson and cellmate and co-indictee Otis Lee Fairley in which, without objection by defense counsel, the following transpired at trial:

> Q. Tell me what you heard Mr. Johnson and Mr. Fairley say. Without telling anybody else.

> A. I overheard them talking about how one took the knife off the top of the car.
>
> Q. Which one was that?
>
> A. And gave it to the other one. Otis took the knife off the top of the car and gave it to Sam.
>
> Q. What did Sam say, if anything, if you remember?
>
> A. I don't remember. I can't remember where—he just stated that was the fact, the way he took the knife and *used the knife.*
>
> Q. Is that the gist of the conversation as best you can remember it?
>
> A. Yes, sir.
>
> [Vol. XI, p. 1930] [Emphasis added]

There was no objection and the defense cross-examined Norman Shelly. In this appeal the appellant pleads complete surprise and that he had no opportunity to interview the witness concerning this statement.

Defense made two motions before trial which in this assignment of error he asserts have been violated. The first was a motion for disclosure of witnesses, all evidence favorable to accused and discovery and inspection [Supplemental Abstract, pp. 389-390; Vol. II, pp. 207-210], which was granted. [Supplemental Abstract, p. 391; Vol. V, p. 706] The second was a motion to suppress written or oral statements made to Johnson by any investigating officer [Supplemental Abstract, pp. 392-393; Vol. II, pp. 224-226], which was granted as confessed by the D.A. *Tolbert v. State*, 441 So.2d 1374, 1375 (Miss.1983).

Johnson claims in this assignment the admission of the above conversation into evidence was reversible error because the prosecutor deliberately violated a court suppression order. He complains the suppression order directed that "no statement of the defendant regarding the facts can be used against him at the trial of this cause."

Contrary to what Johnson now asserts, the above conversation was not embraced in any discovery motion or discovery order.

Johnson's brief contains the following astonishing statements: "Shelly's testimony came as a complete surprise to the Appellant. Defense Counsel had no opportunity to interview the witness concerning the statements attributed to the Appellant." [sic] [Supplemental Brief, p. 1]

If this were the case, why did defense counsel make no objection? Further, the admission of this testimony was not assigned as error in the detailed motions for new trial. On appeal, Johnson has changed counsel. Johnson and his counsel go outside the record in claiming Shelly's testimony came as a complete surprise. No such claim appears in the record.

To permit a defendant and his counsel in any case, including a death penalty case, to sit idly by and make no objection to questionable testimony, exacerbate the matter still further by ignoring the testimony in the motion for new trial, and argue for the first time on appeal the admission of such testimony, would countenance the laying of a trap in every case. This is especially true where, as in this case, there has been a change in defense counsel.

In the first place, from this record we do not know if Johnson's counsel was unaware of this proferred testimony prior to trial. In the second place, it is clear from this record Johnson was ably represented by thorough defense counsel, and there may have been a very good reason why no objection was made.

The facts of this case are clearly distinguishable from *Tolbert v. State*, 441 So.2d 1374 (Miss.1983), and there is no merit in this assignment.

XIV.

VIOLATION OF RULE IN PERMITTING THE SHERIFF TO TESTIFY

In rebuttal Sheriff Lloyd Jones testified. Johnson complains that Sheriff Jones should not have been permitted to testify in rebuttal to deny he had a conversation with a defense witness Carl Lee. The reason is that Jones was not excluded from the courtroom when the rule was invoked. Permitting an officer of the court to remain in the courtroom is discretionary with the trial court. See: *Bell v. State*, 443 So.2d 16 (Miss.1984).

XV.

WAS DEFENDANT BROUGHT IN THE PRESENCE OF THE JURY IN HANDCUFFS?

Johnson goes outside the record and claims that he was brought into the courtroom in the presence of the jury in handcuffs. The record does not support this claim. Indeed, the record indicates that the court saw to it that this would not occur. [Vol. VIII, p. 1250]

XVI.

ADMISSION OF CHECKS FOUND IN AUTOMOBILE, WHICH CONTAINED FINGERPRINTS OF JOHNSON AND LANGHAM

The trial court permitted the introduction into evidence of checks found in the automobile, after ruling that they could only be referred to as "documents." [Vol. IX, pp. 1506-1511] These documents were not circulated to the jury but the fingerprint expert referred to them in his identification as having the fingerprints of Johnson.

XVII.

FAILURE TO PROVIDE JOHNSON WITH COUNSEL AT THE ARRAIGNMENT HEARING

Johnson complains, without citation of authority, the state failed to provide him with counsel at the "initial appearance hearing." He states this violated his constitutional rights. The record does not support this contention. [Vol. IV, p. 605, et seq.]

XVIII.

EXCLUSION OF JURORS WHO HAD CONSCIENTIOUS SCRUPLES AGAINST INFLICTION OF DEATH PENALTY

Johnson argues that it was error to exclude in the guilt phase of his trial jurors who clearly had fixed conscientious scruples against infliction of the death penalty. There was no error in excluding such jurors. See: *Wilcher v. State*, 448 So.2d 927 (Miss.1984); *Sonnier v. Maggio*, 720 F.2d 401 (5th Cir.1983); *Smith v. Balkcom*, 660 F.2d 573 (5th Cir.1981); *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir.1978); and *Woodard v. Hutchins*, 464 U.S. 377, 104 S.Ct. 752, 78 L.Ed.2d 541 (1984).

XIX.

THE ADMINISTRATION OF THE DEATH PENALTY IN THIS STATE IS ARBITRARY AND DISCRIMINATORY IN VIOLATION OF THE APPELLANT'S EIGHTH AND FOURTH AMENDMENT RIGHTS

Johnson claims that he was denied a request to present evidence on the death penalty being administered in an arbitrary and discriminatory manner. The record reveals Johson made a motion to strike and quash as unconstitutional the death penalty statute (Vol. II, pp. 239-243) and the hearing his counsel requested on the motion was held by the court. (Vol. IV, pp. 605-700).

Nothing offered by Johnson supports his contention that the death penalty is being administered unfairly because of either his or the victim's race.

PART B.

ROY NOBLE LEE, Presiding Justice, for the Court:

THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THEIR OPTION TO RECOMMEND A LIFE SENTENCE EVEN IF AGGRAVATING CIRCUMSTANCES WERE FOUND TO OUTWEIGH MITIGATION.

The requested instruction, which was refused by the court, follows:

> The court instructs the jury that if you see fit, whether mitigating circumstances exist or not, you may recomment [sic] mercy for the defendant. This recommendation is solely in your discretion and not controlled by any rule of law. You may make such recommendation with or without a reason.

The appellant contends that refusal of the instruction constituted reversible error. However, the question has been resolved against the position of appellant in three (3) felony murder cases wherein the death penalty was imposed, viz, *Bullock v. State*, 391 So.2d 601 (Miss.1981); *Jordan v. State*, 365 So.2d 1198 (Miss.1978); and *Hill v. State*, 432 S.2d 427 (Miss.1983). In *Hill v. State*, a similar instruction to that refused here was under consideration. The Court said:

> Argument of appellant is that reversible error was made by the trial court when it failed to grant the following sentencing information requested by the defense:

Instruction D-2:

Ladies and gentlemen of the jury, I charge you that you need not find any mitigating circumstance in order to return a sentence of life imprisonment. A life sentence may be returned regardless of the evidence.

The appellant contends that this refusal had the effect of denying the jury the right to sentence him according to their feelings of mercy. He maintains that the jury was left with the impression that they were bound to return a verdict that the appellant should suffer the death penalty if they found that aggravating circumstances outweighed the mitigating circumstances from the evidence presented. According to him, this would be tantamount to a mandatory application of the death penalty and contrary to the mandate of individualized consideration handed down by the United States Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

We do not agree that the jury in the case in question was under any impression that they had no choice but to impose the death penalty. Their verdict was as follows:

> We, the Jury, unanimously find that the aggravating circumstances . . . outweigh the mitigating circumstances and are sufficient to impose the death penalty, and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances. . . .

432 So.2d at 441.

The jury verdict in the case sub judice was almost verbatim to the verdict in *Jordan* and the same reasoning that applied there must prevail here.

Juries may pardon an accused by a not guilty verdict, when his guilt is overwhelming from the record; they may exercise clemency toward one found guilty, where the statute permits juries to fix the punishment, and the verdicts will be upheld. However, trial judges are required to instruct juries, according to the law.

The judgment of the lower court is affirmed and Wednesday, the 19th day of June, 1985, is set as the date for execution of the sentence and infliction of the death penalty in the manner provided by law.

AFFIRMED AS TO GUILT PHASE; AFFIRMED AS TO SENTENCING PHASE.

PATTERSON, C.J., WALKER, and ROY NOBLE LEE, P.JJ., and DAN M. LEE, PRATHER, ROBERTSON, SULLIVAN and ANDERSON, JJ., concur as to Part A.

HAWKINS, J., dissents as to Part B.

APPENDIX "A"

DEATH PENALTY CASES AFFIRMED BY THIS COURT:

Cabello v. State, 471 So.2d 332 (Miss.1985)
Billiot v. State, 454 So.2d 445 (Miss.1984)
Dufour v. State, 453 So.2d 337 (Miss.1984)
Stringer v. State, 454 So.2d 468 (Miss.1984)
Wilcher v. State, 455 So.2d 727 (Miss.1984)
Wilcher v. State, 448 So.2d 927 (Miss.1984)
Neal v. State, 451 So.2d 743 (Miss.1984)
Booker v. State, 449 So.2d 209 (Miss.1984).
Caldwell v. State, 443 So.2d 806 (Miss.1983)
Irving v. State, 441 So.2d 846 (Miss.1983)
Tokman v. State, 435 So.2d 664 (Miss.1983)
Leatherwood v. State, 435 So.2d 645 (Miss.1983)
Hill v. State, 432 So.2d 427 (Miss.1983)
Pruett v. State, 431 So.2d 1101 (Miss.1983)
Gilliard v. State, 428 So.2d 576 (Miss.1983)
Evans v. State, 422 So.2d 737 (Miss.1982)
King v. State, 421 So.2d 1009 (Miss.1982)
Wheat v. State, 420 So.2d 229 (Miss.1982)
Smith v. State, 419 So.2d 563 (Miss.1982)
Edwards v. State, 413 So.2d 1007 (Miss.1982)
Johnson v. State, 416 So.2d 383 (Miss.1982)
Bullock v. State, 391 So.2d 601 (Miss.1980)
Reddix v. State, 381 So.2d 999 (Miss.1980)
Jones v. State, 381 So.2d 983 (Miss.1980)
Culberson v. State, 379 So.2d 499 (Miss.1979)
Gray v. State, 375 So.2d 994 (Miss.1979)

Jordan v. State, 365 So.2d 1198 (Miss.1978)
Voyles v. State, 362 So.2d 1236 (Miss.1978)
Irving v. State, 361 So.2d 1360 (Miss.1978)
Washington v. State, 361 So.2d 61 (Miss.1978)
Bell v. State, 360 So.2d 1206 (Miss.1978)

DEATH PENALTY CASES REVERSED AS TO PUNISHMENT AND REMANDED FOR RESENTENCING TO LIFE IMPRISONMENT:

Edwards v. State, 441 So.2d 84 (Miss.1983)
Dycus v. State, 440 So.2d 246 (Miss.1983)
Coleman v. State, 378 So.2d 640 (Miss.1979)

DEATH PENALTY CASES REVERSED AS TO PUNISHMENT AND REMANDED FOR A NEW TRIAL ON SENTENCING PHASE ONLY:

Mhoon v. State, 464 So.2d 77 (Miss.1985)
Cannaday v. State, 455 So.2d 713 (Miss.1984)
Wiley v. State, 449 So.2d 756 (Miss.1984)
Williams v. State, 445 So.2d 798 (Miss.1984)

HAWKINS, Justice, dissenting as to Part B:

For the reasons stated in dissenting in *Hill v. State*, 432 So.2d 427, 453 (Miss.1983), and also adopting the views of Justice Robertson in his dissent in *Leatherwood v. State*, 435 So.2d 645, 660 (Miss.1983), I think the circuit judge erred in refusing to grant the instructions informing the jury it had the discretion to impose a life sentence upon Johnson, regardless of the evidence.

To me the jury system is sacred, a view apparently shared by the authors of our State Constitution, who wrote, "The right of trial by jury shall remain involate,

. . ."[1] It is not rhetoric or oratory, at least to me, to assert there is more wisdom in juries than can ever be enunciated by judges.

We learned 100 years ago in this state, after at least 150 years' experience, that the jury should have the absolute right, and should be instructed by the Court that they and they alone had such right, to spare the defendant's life regardless of the evidence: See: *Spain v. State*, 59 Miss. 19 (1881).

We recognize that opinions from the U.S. Supreme Court, beginning in 1972, have drastically changed capital offense laws and procedures, but no U.S. Supreme Court decision has ever suggested this discretionary power be removed from the jury to *spare the defendant's life.* Rather, the channeling of the jury's discretion was to limit the circumstances under which it could impose the death penalty, not the reverse.

Yet, this Court has held the jury is not entitled to be instructed by the circuit judge that it has this sacred right.

In doing so we ignore history and human experience; we implicitly overrule *Spain v. State.* We denigrate the majesty of our jury system. I can only urge this Court some day to change the present majority holding. I hope circuit judges of this State will unanimously, as many already do, tell the jury as we said 100 years ago, they have the discretion, regardless of the evidence, to sentence the defendant to life imprisonment rather than death.

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[1] Mississippi Constitution, Article 3, § 31.

IN THE SUPREME COURT OF MISSISSIPPI

(Title Omitted in Printing)

EXCERPTS FROM PETITIONER'S MOTION FOR POST-CONVICTION RELIEF

(Filed August 4, 1986)

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* * * *

II. The Trial Court Erred in Admitting a 19-Year-Old Prior Conviction as an Aggravating Circumstance

23. Johnson was denied his rights secured by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 3, Sections 14, 16 and 28 of the Mississippi Constitution when the State introduced into evidence over petitioner's objection (R. 2196), and the jury relied upon, a 1963 New York Class D felony conviction for assault in the second degree because such conviction was invalid.

24. Johnson's 1963 New York conviction is invalid for the following reasons:

(a) It was obtained by police questioning subsequent to his indictment, while he was in custody, but without the presence of counsel. Under *People* v. *Waterman*, 9 N.Y.2d 561, 216 N.Y.S.2d 70 (1961) and other authorities, the use at trial of a conviction so obtained was fundamental error under the New York State Constitution and the Criminal Procedure Law.

(b) Johnson was never informed of his right to appeal during his sentencing hearing in 1963 and was never provided with competent appellate counsel after his trial and during subsequent post-conviction proceedings. This was error under *Douglas* v. *California*, 372 U.S. 353 (1963) (direct appeal) and *Lane* v. *Brown*, 372 U.S. 477 (1963) (*coram nobis*). This was also error under *People* v. *Montgomery*, 24 N.Y.2d 519, 299 N.Y.S.2d 156 (1976).

(c) Johnson's 1963 conviction is tainted by an involuntary confession which was introduced at his trial. The fact that no hearing was ever held as to the voluntariness of that confession is fundamental constitutional error. *Jackson* v. *Denno*, 378 U.S. 368 (1965). Johnson is entitled to a hearing on the voluntariness issue, and if a fair hearing cannot now be held, he is entitled to have his conviction vacated.

25. Said conviction is now subject to a Motion to Vacate Invalid Conviction pending in the Monroe County Court. *The People of the State of New York* v. *Samuel Bice Johnson*, No. 1723/63, Monroe County Court. *See* Appendix, Exhibit L.

III. The Record of the Prior Conviction Was Inaccurate and the State Misled the Jury on the Conviction

26. Johnson was denied his rights secured by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 3, Sections 14, 16 and 28 of the Mississippi Constitution when the State introduced into evidence, and the jury relied upon, a 1963 New York Class D felony conviction because such conviction for assault in the second degree was not scrutinized by the court for its facial constitutionality and accuracy, but was simply admitted into evidence. Any examination into the record of the conviction would have shown such to be unconstitutional and invalid under the laws of New York and the United States Constitution.

27. The defense was grievously prejudiced by the State's constant and intense reference to the crime—22 times in its penalty phase closing—as "assault in the second degree with intent to commit rape in the first degree." Such references are plain and extremely prejudicial error. Petitioner was merely convicted of second degree assault, the least serious felony in New York, for which petitioner served but one year after which he was paroled for good behavior.

* * * *

IN THE SUPREME COURT
OF THE STATE OF MISSISSIPPI

September 1986 Term

(Title Omitted in Printing)

EXCERPTS—RESPONSE TO PETITIONER'S APPLICATION FOR LEAVE TO FILE MOTION FOR POST-CONVICTION RELIEF

(Filed November 6, 1986)

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* * * *

Finally petitioner raises the question of his 1963 conviction in New York for assault with intent to rape. As of this date the conviction still stands. A petition for writ of error coram nobis has been filed with the courts of New York attacking this conviction on the basis of the failure to grant an appeal and failure to give a proper hearing on the voluntariness of the confession petitioner gave at the time. Because the record of the trial has been destroyed or lost relief will probably be granted. This would do no harm to the conviction here as there are two other valid aggravating circumstances existing in this case that the jury found.

However the question is the failure to investigate concerning this earlier conviction. The truth of the matter is that such a conviction is presumed to be correct just as counsel stated in his affidavit. Although the crime was assault in the second degree the indictment reads assault

with intent to commit rape. At the sentencing hearing the trial judge stated:

> And here he is now, a rapist and that's what he is; attacked an innocent young lady who was on her way to work in the kitchen of one of our local hospitals. He is without question lazy, a liar and a rapist.
>
> Exhibit K to Motion, at page 2.

Try as he may he cannot change what he was charged with and convicted. There was a trial with a jury and a conviction. Trial counsel was perfectly within sound trial practices to assume that a conviction that was 20 years old without a challenge was valid. Where is the prejudice as there are two other aggravating circumstances existing in this case.

* * * *

LETTER DATED MARCH 26, 1987 FROM ANTHONY PADUANO, ESQ., PETITIONER'S COUNSEL, TRANSMITTING CERTIFIED COPY OF THE MARCH 24, 1987 JUDGMENT OF THE NEW YORK COURT OF APPEALS TO THE MISSISSIPPI SUPREME COURT

CAHILL GORDON & REINDEL
Eighty Pine Street
New York, N.Y. 10005

March 26, 1987

Re: State v. Johnson,
No. 55,265

Dear Ms. Gordon:

Further to my letter of yesterday, I enclose for filing 10 copies of Exhibit M to the Appendix to Mr. Johnson's Motion for Post-Conviction Relief. Exhibit M is the March 24, 1987 Order and Decision of the Court of Appeals of the State of New York, the State's highest court, vacating Mr. Johnson's 1963 conviction for second degree assault and dismissing the underlying indictment.

Thank you for your assistance.

Yours sincerely,

/s/ Anthony Paduano
ANTHONY PADUANO

Hon. Sue Gordon
Clerk of the Court
Supreme Court of Mississippi
Box 177
Jackson, Mississippi 39205

[Enclosures]

FEDERAL EXPRESS

cc: Hon. Marvin L. White, Jr.
Hon. Clive A. Stafford Smith

Exhibit M

STATE OF NEW YORK
COURT OF APPEALS

THE PEOPLE &C.,
Respondent,

v.

SAMUEL BICE JOHNSON,
Appellant.

OPINION

Laurence T. Sorkin & Anthony Paduano, NY City, for appellant.

Howard R. Relin, DA, Monroe County (Melvin Bressler of counsel) for respondent.

PER CURIAM,

Defendant was convicted of murder in the State of Mississippi and presently awaits execution of a death sentence, which has been temporarily stayed pending decision on his petition for post-conviction relief. To advance his efforts to obtain such relief, defendant now seeks reversal of a 1963 New York assault conviction, which was used as an aggravating factor at the sentencing phase of the Mississippi trial.

We construe the Appellate Division order as one affirming the judgment of resentence and determining the review of the underlying 1963 conviction was not available. This order is appealable to this Court (CFL 450.90).

We agree that, as the defendant argues and the People concede, the passage of time does not bar appeal in the

unusual circumstances of this case, which include the possible use of the conviction as an aggravating factor leading to a death sentence. It is undisputed that defendant was never advised of his right to appeal from the assault conviction and that, upon discovering that right, he made several timely and diligent *pro se* attempts to obtain review of the judgment through the avenues available to him at the time. Further, it is undisputed that the actions of this State prevented defendant from ever obtaining the review of the conviction to which he was entitled.

The appeal is not barred by CPL 450.30(3), which provides, in essence, that the time for taking an appeal from the original judgment is not revived by a resentencing that occurs more than 30 days after the original sentence was imposed. Nor is appeal barred by CPL 460.30, which limits the time for seeking an extension of the 30-day period for taking an appeal to one year from the date that the statutory 30-day period expired. Both of these statutes became effective after the period between 1967 and 1971, when defendant's timely efforts to appeal were being thwarted by the State (*see People v. Montgomery*, 24 NY2d 130). In these special circumstances, the People, as they correctly concede, cannot rely upon a subsequently imposed time limitation to prevent a defendant from obtaining appellate review of his conviction (*People v. Thomas*, 47 NY2d 37). *People v. Corso* (40 NY2d 578), which held CPL 460.30 applicable to appeals from judgments of conviction entered prior to that statute's enactment, does not require a different conclusion, since that decision did not concern a situation in which the defendant had made timely efforts to raise an appealable issue before the statute was adopted.

Finally, the People concede that the records of defendant's trial have ben lost, that neither reconstruction nor a new trial is possible and that defendant has raised appealable issues with possible merit. Thus, the only available remedy at this point is vacatur of the conviction and dismissal of the indictment (*see People v. Rivera*, 39 NY2d 519).

Accordingly, the order of the Appellate Division should be reversed, the conviction vacated and the indictment dismissed.

Order reversed, conviction vacated and indictment dismissed. Opinion Per Curiam. Chief Judge Wachtler and Judges Simons, Kaye, Titone, Hancock and Bellacosa concur. Judge Alexander took no part.

Decided March 24, 1987

SUPREME COURT OF MISSISSIPPI

No. DP-43

SAMUEL BICE JOHNSON

v.

STATE OF MISSISSIPPI

May 27, 1987

Rehearing Denied July 14, 1987

ON MOTION FOR POST-CONVICTION RELIEF

HAWKINS, Presiding Justice, for the Court:

Samuel Bice Johnson filed a petition for relief under our Mississippi Uniform Post-Conviction Collateral Relief Act (CRA), Miss. Code Ann. § 99-39-1, et seq. We address only those assignments contemplated by the CRA for which we are authorized to review in a petition of this nature. For the reasons set forth, we deny his petition.

Following a trial held in the circuit court of Pike County on August 30-September 3, 1982, Samuel Bice Johnson was convicted of capital murder and sentenced to death. His conviction was affirmed by this Court on May 8, 1985, and his petition for rehearing was denied November 6, 1985; *Johnson v. State*, 477 So.2d 196

(Miss.1985). The United States Supreme Court denied his petition for certiorari, *Johnson v. Mississippi*, — U.S. ——, 106 S.Ct. 1958, 90 L.Ed.2d 366 (1986), and subsequently denied his petition for rehearing, — U.S. ——, 106 S.Ct. 2930, 91 L.Ed.2d 557 (1986).

On August 4, 1986, he filed with this Court his petition for relief under our Mississippi Uniform Post-Conviction Collateral Relief Act (CRA), Miss.Code Ann. § 99-39-1, et seq. His petition consists of 60 pages, supported by a brief of 85 pages, a supplemental motion to amend with supporting brief, and exhibits of several hundred pages. The petition contains 42 assignments, and the amendment to the petition adds another.[1]

The purpose of a CRA petition is set forth in Miss. Code Ann. § 95-39-3(2):

> (2) Direct appeal shall be the principal means of reviewing all criminal convictions and sentences, and the purpose of this chapter is to provide prisoners with a procedure, limited in nature, to review those objections, defenses, claims, questions, issues or errors which in practical reality could not be or should not have been raised at trial or on direct appeal.

Miss.Code Ann. § 99-39-21 reads in pertinent part:

> (1) Failure by a prisoner to raise objections, defenses, claims, questions, issues or errors either in fact or law which were capable of determination at trial and/or on direct appeal, regardless of whether such are based on the laws and the Constitution of the state of Mississippi or of the United States, shall

[1] Johnson was represented in his trial by Gerald Diaz and Gregory L. Harper of the Jackson Bar; on appeal to this Court by Kenneth J. Rose of the Atlanta Bar; in his petition to the United States Supreme Court by Clive A. Stafford Smith of the Atlanta Bar and in his present petition by Clive A. Stafford Smith of the Atlanta Bar and Laurence T. Sorkin and Anthony Paduano of the New York Bar.

constitute a waiver thereof and shall be procedurally barred, but the court may upon a showing *of cause* and *actual prejudice* grant relief from the waiver.

* * * *

(4) The term "cause" as used in this section shall be defined and limited to those cases where the legal foundation upon which the claim for relief is based *could not have been discovered with reasonable diligence at the time of trial or direct appeal.*

(5) The term "actual prejudice" as used in this section shall be defined and limited to those errors which would have actually adversely affected the ultimate outcome of the conviction or sentence. [Emphasis added]

(6) The burden is upon the prisoner to allege in his motion such facts as are necessary to demonstrate that his claims are not procedurally barred under this section.

In a petition of this nature, we are also governed by Miss.Code Ann. § 99-39-27(5):

> (5) Unless it appears from the face of the application, motion, exhibits and the prior record that the claims presented by such are not procedurally barred under section 99-39-21 and that they further present a substantial showing of the denial of a state or federal right, the court shall by appropriate order deny the application.

Moreover, we do not consider on a petition of this nature issues raised and decided on the original appeal, even though theories for relief different from those urged at trial and on appeal are now asserted. Miss.Code Ann. § 99-39-21(2), (3). *Dufour v. State*, 483 So.2d 307, 311 (Miss.1985), (and cases cited therein).

Within these circumscribed boundaries, we address the appropriate assignments in Johnson's petition.

I.

JOHNSON'S 1963 NEW YORK CONVICTION AS AN AGGRAVATING CIRCUMSTANCE

During the course of the sentencing phase of trial, the State introduced an authenticated copy of a judgment of conviction of Johnson of assault, second degree with intent to commit rape, first degree, rendered by the Monroe County court New York on April 9, 1963. This was offered as one of three aggravating circumstances to support the death penalty. (R. 2171-2173). Johnson did not testify either at the guilt or sentencing phase of his trial.

During the course of his argument, the district attorney recited this conviction as a basis for the jury to render a death penalty verdict. (R. 2273)

In his motion for a new trial and on appeal, Johnson objected to the introduction of the record of this conviction because it did not channel the jury's discretion by "clear and objective standards," and because it was too remote. (Appellant's Brief, pp. 29-31) We rejected both arguments. 477 So.2d at 218-219.

In his petition for certiorari to the U.S. Supreme Court, no claim of error was made to the introduction of this record into evidence as an aggravating circumstance.

In this petition, for the first time, Johnson argues that the 1963 conviction was invalid. Apparently, following or commensurate with its filing, Johnson's counsel also took steps to have this conviction vacated by the New York courts. This Court has been furnished with a copy of an order and slip opinion of the Court of Appeals of New York, dated March 24, 1987, in which that court

did indeed reverse and vacate this 1963 conviction and dismiss the indictment.

From the exhibits it appears that Johnson did not appeal his 1963 conviction and that he served a year in a New York correctional institution for this crime.

Miss.Code Ann. § 99-19-101(5)(b) provides:

> (5) Aggravating circumstances shall be limited to the following:
>
> * * * *
>
> (b) The defendant was previously convicted of another capital offense of or a felony involving the use of threat of violence to the person.

The aggravating circumstances enumerated in the court's instruction at trial were:

> (1) That the defendant, Samuel Johnson, was previously convicted of a felony involving the use or threat of violence to the person of another.
>
> (2) That the defendant, Samuel Johnson, committed the capital murder for the purpose of avoiding arrest or effecting an escape from custody.
>
> (3)The capital murder was especially heinous, atrocious and cruel.

(R.2236)

The verdict of the jury found all three of these aggravating circumstances existed. (R. 2294)

It is apparent that Johnson waived this claim, and it is procedurally barred. At no time during his direct appeal, or in his petition for certiorari to the U.S. Supreme Court did he argue his New York conviction was constitutionally invalid. Moreover, there is nothing to suggest he took any steps to vacate this conviction until he filed this petition. On appeal Johnson's counsel alleged thirteen assignments of error, and at Johnson's own urging, his counsel added seven additional assignments. None questioned the validity of his New York conviction. See *Evans v. State*, 485 So.2d 276 (Miss. 1986), at 280-281.

Also, the jury found three aggravating circumstances to support its verdict. Even if we conceded that the jury had no authority to consider this conviction, the remaining two aggravating circumstances were sufficient to support the jury's verdict. *Zant v. Stephens*, 462 U.S. 862, 880-884, 103 S.Ct. 2733, 2744-2746, 77 L.Ed.2d 235, 252-254 (1983); *Irving v. State*, 498 So.2d 305, 314 (Miss.1986).

Aside from the statutory limitation of review, we remain unpersuaded by this contention.

We have never faced this question. A somewhat similar question has been before us concerning the use of a prior criminal conviction to impeach a defendant in a criminal trial. We have held that subsequent reversal on appeal of a prior conviction did not affect a defendant's trial conviction. *Young v. State*, 425 So.2d 1022 (Miss.1983); *Milstid v. State*, 347 So.2d 1319 (Miss. 1977); and *Nicholson v. State*, 254 So.2d 881 (Miss. 1971).

Also, in *Phillips v. State*, 421 So.2d 476 (Miss.1982), the state used a Kentucky conviction as a basis for Phillips' conviction under one of Mississippi's habitual criminal statutes. Miss.Code Ann. § 99-19-81 (Supp.1984). We held that when the conviction was subsequently reversed, it could constitute a basis for post-conviction relief from the habitual criminal conviction.

Under Miss.Code Ann § 99-19-81, however, upon proof of the prior conviction a circuit judge has no alternative except to sentence to the maximum authorized by law. Such sentence cannot be suspended, and the accused will never be eligible for parole or probation prior to serving this maximum sentence. In the sentencing phase of a

capital murder trial the jury is not required to sentence the defendant to death, regardless of its finding.

When a prior conviction is used under either habitual offender statute, it is, of course, certain that the defendant will receive greater punishment. The admission of a prior conviction in order to impeach the accused as a witness, or at a sentencing phase of a capital murder trial may or may not materially influence the jury.

As we noted, the jury found three aggravating circumstances existed, and of the three we have little doubt that in a rational sentencing process *Zant v. Stephens*, supra, the other two aggravating circumstances would carry greater weight than the New York conviction in determining Johnson's sentence. Indeed, the remoteness in time of the prior conviction was a mitigating circumstance. *Johnson v. State*, 477 So.2d at 219.

We eschew "harmless error" in our reasoning, however, because the district attorney argued this particular aggravating circumstance as a reason to impose the death penalty. *Johnson v. State*, 477 So.2d at 219. Nevertheless, we reject New York's setting aside of the 1963 conviction as a basis to vitiate the verdict of the jury.

If there is one single point emphasized by the U.S. Supreme Court decisions of *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed. 2d 859 (1976); and *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), it is that before a jury is permitted to sentence a human being to death, it must have clear guidelines. The centerpiece of these decisions requires the jury to find one or more aggravating circumstances exist before they can impose the death sentence. Of course, any such "aggravating circumstance" must reasonably justify making the difference between imposing a life sentence or the death penalty.

If the death penalty is to be imposed without caprice or chance, there is no doubt that a crucial guideline to assist citizens who have this formidable responsibility is whether the convicted murderer has engaged in serious criminal conduct involving violence to other people in the past. Thus, the reason for Miss.Code Ann. § 99-19-101 (5)(b).

There is no question but that the state proved this aggravating circumstance in this case. At the time of Johnson's trial, New York had imposed a final conviction and Johnson had served his sentence.

If we adopted Johnson's argument, the state could never use a conviction as an aggravating circumstance, because of the extreme likelihood that a foreign state could overturn the prior conviction through collateral attack. The loss of this guideline to a jury would serve to return juries to the unbridled, unchannelled, and hence, unconstitutional discretion they had in imposing the death sentence.

We are not required in this case to go as far as *Nicholson*, *Milstid* and *Young*, *supra*, in authorizing introduction of proof of a prior conviction in a capital murder case. That is, in this case, we do not address whether a prior conviction can be used as an aggravating circumstance if that conviction is subsequently reversed on direct appeal. We do hold that a foreign state cannot vitiate the death penalty verdict in this state by setting aside a prior conviction of a violent crime through a collateral relief petition.

We deem it important to add in this case that there is no evidence or indication that the post-conviction relief proceedings in the New York courts were truly adversarial. Insofar as we can determine from Johnson's petition and exhibits, the state's attorney in New York had no significant interest or concern in vouchsafing the validity of his 1963 conviction, and we find no challenge

by the state's attorney of New York of Johnson's petition. Other than Johnson, this state had the greatest interest in upholding the validity of his New York conviction. Yet, this state was not made a party to Johnson's petition and had no voice in any of the New York proceedings to vacate his conviction. Indeed, we know of no method whereby this state could have been made a party to the New York proceedings, and this state probably should not have been a party. This does not remove the fact that the proceedings lacked an essential adversarial ingredient. The New York courts are, of course, the final and proper arbiters of all judicial proceedings in that state, including the disposition of post-conviction petitions. Assuredly, by our view, we suggest no impropriety in the courts of that state taking whatever action they deem appropriate in a criminal case in New York. The fact remains that Johnson was convicted in 1963 by a New York court of a serious felony involving violence to a female for which he was imprisoned in that state. No New York court extended Johnson relief from his conviction before Johnson paid his debt to the state. If his crime was serious enough for him to be convicted and final enough for him to serve time in a penal institution, it had sufficient finality to be considered as an aggravating circumstance by a jury of this state. No death penalty verdict based upon this conviction need be vitiated by the subsequent relief granted more than twenty years later by the New York Court of Appeals.

We accordingly reject all assignments of Johnson's petition based upon his 1963 conviction in the State of New York.

II

INEFFECTIVE COUNSEL

The only remaining assignments of Johnson not clearly procedurally barred are assignments VII and VIII wherein he claims his trial counsel were ineffective

in their representation of him during the guilt and sentencing phases of his trial, thus depriving him of his Sixth Amendment right to assistance of counsel. Under the assignments he lists some forty instances in which he claims his lawyers did not render professional service guaranteed to him by the Sixth Amendment.

The Sixth Amendment states the accused has the right "to have the Assistance of Counsel for his Defense."

Literally hundreds of court decisions have grappled with this phrase since the U.S. Supreme Court in *Powell v. State*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158, 84 A.L.R. 527 (1932), announced the Sixth Amendment required something more than just having a person with a law license sitting at the counsel table with an accused. Also, *Avery v. Alabama*, 308 U.S. 444, 446, 60 S.Ct. 321, 322, 84 L.Ed 377 (1940). A number of these cases are annotated and the various authorities examined in 4 A.L.R.4th 1—244 (1980); see also 1986 supplement.

In 1984 the U.S. Supreme Court in two seminal cases set forth guidelines to determine whether the constitutional guaranty had been met. *U.S. v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); and *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Strickland tells us the benchmark inquiry is whether defense "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686, 104 S.Ct. at 2064. It is an attack on the "fundamental fairness of the proceeding." *Id.* at 697, 104 S.Ct. at 2070. The Court then held the "proper standard for attorney performance is that of reasonably effective assistance," and it was incumbent upon a defendant to show that "counsel's representation fell below an objective standard of reasonableness. More specific guidelines are not appropriate." *Id.* at 687-688, 104 S.Ct. at 2064. Also,

"judicial scrutiny of counsel's performance must be highly deferential," and "every effort be made to eliminate the distorting effects of hindsight." *Id.* at 689, 104 S.Ct. at 2065. The Court must then determine, in light of all the circumstances, the identified acts or omissions were outside the *wide range* of professionally competent assistance." [Emphasis added] *Id.* at 690, 104 S.Ct. at 2066.

In addition, the accused must show he was prejudiced. That is, he must prove there is "a reasonable probability that but for counsel's *unprofessional* errors, the result of the proceeding would have been different." [Emphasis added] *Id.* at 694, 104 S.Ct. at 2068.

And finally, in determining whether ineffectiveness of counsel justifies setting aside a conviction, the appellate court may "independently weigh the evidence," and decide whether the aggravating and mitigating circumstances on balance warranted the death penalty.

This Court has followed the guidelines of *Strickland* in *Irving v. State*, 498 So.2d 305 (Miss.1986); *Evans v. State*, 485 So.2d 276 (Miss.1986); *Dufour v. State*, 483 So.2d 307 (Miss.1985); *Leatherwood v. State*, 473 So.2d 964 (Miss.1985); *Lambert v. State*, 462 So.2d 308 (Miss.1984); *Gilliard v. State*, 462 So.2d 710 (Miss. 1985).

What then does "assistance of counsel" mean?

It obviously means an accused has the right to a lawyer to represent him. Just as obviously, it cannot mean there is a constitutional guaranty to a lawer who in hindsight made no errors in defending the case. This would be tantamount to a constitutional guaranty of non-conviction. It would lend to continued court battles with successive defense lawyers, each of whom in hindsight could be found to have made mistakes. This never ending battle would continue until the state wearily threw in the towel. *Covington v. State*, 600 S.W.2d 186

(Mo.App.1980); *People v. Moody*, 676 P.2d 691 (Colo. 1984); *Commonwealth v. Saferian*, 366 Mass. 89, 315 N.E.2d 878 (1974); *State v. Wolf*, 347 N.W.2d 573 (N.D.1984).

Yet, if the Sixth Amendment guaranty has any meaning it must mean more than simply having a man admited to law practice as a defense lawyer for the accused. *U.S. v. Cronic, supra.* It must mean that a lawyer with some competence conscientiously represented the accused. *Dufour v. State, supra.* It must require both, because an incompetent can be conscientious, and an otherwise competent lawyer can by a lack of concern for his responsibility, fail in his adversarial duty.

Yet it does not necessarily mean that a lawyer was either incompetent or failed to responsibly represent his client because he made mistakes. However, conduct of an attorney, including the mistakes he made, can very well be of such proportion as to reveal the lack of competence or diligence. *Leatherwood v. State, supra.*

Therefore, any Court seeking to determine whether the constitutional guaranty has been met, must look at the entire performance of the attorney and determine whether the defense attorney was competent and whether he sincerely tried to assist his client. In *Dufour v. State*, supra, at 310, we stated: "There are, however, certain basic duties required of an attorney when representing a criminal defendant."

Unless the mistake or conduct was of such magnitude that the Court concludes the lawyer was incompetent or evidenced a failure to conscientiously fulfill his adversarial role, we will conclude the constitutional guaranty for performance of counsel as enunciated in *Strickland* has been met.

Admittedly, these criteria remain generalizations and subject to disagreement between lawyers and judges.

Nevertheless, the members of this Court have each had years to observe trial practice and procedure in this state, and each is able to pass judgment by studying a record to determine whether or not a particular attorney was both competent and had a responsible attitude in his client's defense of a lawsuit in this state.

Indeed, by studying a trial record an appellate judge cannot escape forming an opinion on the performance of trial counsel. The record in this case, contrary to Johnson's assertion, clearly reveals he was represented by competent counsel dedicated to his defense. We have again carefully reviewed the record, and our original view that he had competent, zealous counsel has been reinforced.

They most assuredly met the "reasonably effective assistance," and "wide range of professionally competent assistance," guidelines of *Strickland.* There clearly was no lack of competence, or failure of interest in their defense of Johnson to support the contention that the constitutional guaranty was not met.

III.

REFUSED MOTION FOR CONTINUANCE

For example, Johnson charges his counsel failed to properly move for a continuance, thereby depriving him of expert witnesses, H. Dale Nute and Stephen B. Halligan. These experts examined Johnson's and the other participants' homicide clothing, and studied the laboratory reports of the state and Federal Bureau of Investigation. We have reviewed their letter to Diaz, Johnson's trial defense counsel, dated August 23, 1982, and we find nothing in this report which compels us to conclude that the defense counsel erred in not having these witnesses present at trial. These experts did not reach a conclusion so at odds with the state's proof so as to seriously

challenge Johnson's guilt. Thus their absence from trial does not appear prejudicial.

It is just as plausible that their testimony would have been weak, and upon cross-examination their testimony would have helped the state's case. On the direct appeal of this case, we suspected Johnson's counsel moved for a continuance as a tactical gesture—not really expecting the court to grant it—but hoping that the circuit judge's refusal to grant the continuance would be considered error on appeal. It is not an altogether unfamiliar tactic of defense counsel in criminal as well as civil cases to produce an appeal record cluttered with adverse rulings. Some occasionally stick on appeal. The temptation to use this tactic increases in inverse proportion to the weakness of counsel's case.

IV.

WITHHOLDING OBJECTIONS TO CLOSING ARGUMENT

Of like import is Johnson's claim that his trial counsel were ineffective because they asked the trial judge to permit them to withhold objections to the state's argument until its completion and outside the presence of the jury. This clearly was a tactical decision of counsel. They, of course, knew they had the right to object whenever an improper argument was made. The very fact they made this request to the court evinced an awareness of this right. Rather than risk offending the jury by objecting during argument, they asked permission to withhold objection and make it outside the presence of the jury. We criticized this sort of practice because when an improper argument was in fact made, it did not give the circuit judge the opportunity to correct it promptly upon objection by opposing counsel.

A conscious choice of trial strategy by defense counsel which proves unfortunate is not to be equated with incompetency. *Roe v. State,* 95 Wis.2d 226, 290 N.W.2d

291 (1980); *State v. Baker*, 169 W.Va. 357, 287 S.S.2d 497 (1982). Moreover, in our original opinion we found that the state did not make a prejudicial argument.

V.

FAILURE TO RAISE INVALIDITY OF 1963 CONVICTION

Johnson's claim that his counsel were ineffective for failing to inquire into the invalidity of 1963 conviction ignores the fact that Johnson did not take the stand in the sentencing phase of his trial to assert his innocence of the New York conviction, overlooks Johnson's failure to assert his innocence in the pro se document he filed with this Court on direct appeal, and disregards his counsel's failure to assert it in his appeal to this Court or in his petition for certiorari before the U.S. Supreme Court. He filed no such petition urging us to consider this issue as an additional assignment of error to those filed by his counsel.

VI.

REMAINING INEFFECTIVE ASSIGNMENTS

The remaining complaints Johnson makes of his trial counsel are a litany of Monday morning quarterbacking, attempts to again litigate issues decided, and assertions outside the record. All these fall far short of demonstrating his counsel were not reasonably effective.

The record in this case reveals that two dedicated, assidious trial attorneys did the best they could to defend Johnson. Had the facts which pointed to Johnson's guilt not been overwhelming, his attorneys, no doubt, would have fared much better. In addition, the circuit judge, a jurist renowned for his patience, kindness and forbearance, more than lived up to his reputation in trying this case. No practicing attorney could hope for more consideration from a trial judge than these attorneys received in this case.

It is true we criticized defense counsel in our decision affirming Johnson's conviction for their manner of requesting a continuance, and by their request to withhold objections to the state's closing argument until its conclusion. But there was nothing about our comments to intimate that they harmed Johnson in doing so. To hold that Johnson's trial counsel, in this case, from this record, lacked that degree of competency guaranteed by the Sixth Amendment would make the Sixth Amendment virtually impossible to abide by. No rational mind can conceive of such a proscriptive constitutional requirement as a condition precedent to the validity of a criminal conviction.

The jury in this case believed that Johnson stabbed a highway patrolman in the back and instructed another to shoot him with the patrolman's own gun. Their verdict was supported by overwhelming evidence. This officer was carrying out his duty in a peaceful manner, and posed no physical threat to Johnson or any of his companions. Civilized society depends upon peace officers for its survival. Such a murder can be equated with treason.

In his motion for post-conviction relief, Johnson asserts assignments XII, XVIII and XXIII which he failed to raise at trial or on the direct appeal. Having failed to raise them at trial or upon appeal, Johnson waived his right to assert them in his motion for post-conviction relief. Miss.Code Ann. § 99-39-21 (Supp.1985); *Irving v. State*, 498 So.2d 305, 311 (Miss.1986); *Mann v. State*, 490 So.2d 910, 911 (Miss.1986); *Evans v. State*, 485 So.2d 276, 280 (Miss.1986); *Dufour v. State*, 483 So.2d 307, 308 (Miss.1985).

Johnson also asserts assignments III, IV, V, VI, VIII, IX, XI, XIII, XVI, XVII, XIX, XXI, XXII, XXIV and XXV, which were considered and addressed by us on the direct appeal of his case. Consequently, these assignments are res judicata and cannot be raised again. Miss.

Code Ann. § 99-39-21 (Supp.1985); *Irving v. State, supra; Evans v. State, supra.*

DENIED AND WEDNESDAY, JULY 22, 1987, IS SET AS THE DATE FOR EXECUTION OF THE SENTENCE AND INFLICTION OF THE DEATH PENALTY IN THE MANNER PRESCRIBED BY LAW.

WALKER, C.J., ROY NOBLE LEE, P.J., and DAN M. LEE, ANDERSON and GRIFFIN, JJ., concur.

ROBERTSON, PRATHER and SULLIVAN, JJ., dissent.

ROBERTSON, Justice, dissenting:

I.

In a question begging opinion considering a point of first impression in the administration of this state's capital sentencing system, the majority today denies Samuel Bice Johnson post-conviction relief. It does so contrary to reason and fairness. With respect for my colleagues, I dissent.

II.

The point arises from the order of the Court of Appeals of New York dated March 24, 1987, in which that court vacated and held for naught Johnson's April 9, 1963, conviction of assault, second degree with intent to commit rape, first degree rendered by the Monroe County Court of New York. We may take it that Johnson's 1963 conviction as of the moment is absolutely void and of no further force and effect. Our review of Johnson's capital murder trial in this state reflects that the 1963 conviction was proved by the prosecution and successfully—and argued vigorously—as an aggravating circumstance, compelling the conclusion that Johnson should be given the death sentence. Miss.Code Ann. § 99-19-

101(5)(b) (Supp.1986). The jury in fact found this as one of the aggravating circumstances, to wit:

That the defendant, Samuel Johnson, was previously convicted of a felony involving the use or threat of violence to the person of another.

Today, that prior conviction having been declared a legal nullity, the majority begins by holding Johnson's claim "procedurally barred," adding yet another dubious chapter to this Court's recent and illicit romance[1] with procedural bars. The majority's point, as I understand it, is that, by waiting until after his 1963 conviction had been vacated before asserting any claim for relief, Johnson waived any rights he may have had in the premises.

To my mind, the opposite conclusion follows. Johnson had no basis for the claim he asserts until he obtained the order of March 27, 1987, vacating his 1963 New York conviction. Had he raised the point prior to March 24, 1987, we would no doubt have dismissed it out of hand and, consistent with the temper of the time, would probably now hold the claim barred by res judicata.

In our only consideration heretofore of the procedure by which today's point ought be raised, *Phillips v. State*, 421 So.2d 476, 482-83 (Miss.1982), we held that

> [T]he proper challenge to such a defective conviction lies in a separate action brought expressly for that purpose.

421 So.2d at 482.

Phillips arose in the context of an attack upon a prior conviction which had been used for enhancement of sen-

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[1] My view of the seamier side of this romance appears in *Evans v. State*, 441 So.2d 520, 531-33 (Miss. 1983) (Robertson, J., dissenting) and need not be repeated here. *See also Wheat v. Thigpen*, 793 F.2d 621, 626-27 n. 5 (5th Cir. 1986).

tence under our habitual offender statute. Miss.Code Ann. § 99-19-81 (Supp.1982). The Court held that a defective conviction was voidable, not void, and declared further that until such time as the conviction was judicially vacated in a separate proceeding, it could be used for habitual offender purposes. The Court then repeated that, rather than raising the point at the sentencing phase of the hibitual offender action, the defendant's remedy was a separate post-conviction action which, if successful, would no doubt then be the occasion for relief from his sentence as a habitual offender. *Phillips*, 421 So.2d at 483. The same rationale applies here.

III.

The majority next states that Johnson's death sentence should not be disturbed because, even should the prior conviction aggravating circumstance be eliminated, the jury found two other aggravating circumstances which remain undisturbed.[2] The majority then misreads *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed. 2d 235 (1983). *Stephens* considers only the federal constitutional question. It holds a death sentence not constitutionally infirm by reason of the invalidity of one of several statutory aggravating circumstances found by a jury. The majority's citation to *Stephens* begs today's question, for we are confronted with whether as a matter of a state law the vitiation of one of the aggravating circumstances found by the jury affords Johnson relief from his death sentence and, if so, what form that relief should take. *Stephens* merely sets minimal constitutional limitations and addresses in no way the question we ought to confront today.

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[2] One of these is the highly problematic "the capital murder was espeically heinous, atrocious and cruel." *See Wiley v. State*, 484 So.2d 339-358-60 (Miss. 1986) (Robertson, J., concurring) and *Jones v. State* (Miss. No. Dp-60, dec. Jan. 28, 1987) (Robertson, J., concurring) (not yet reported).

IV.

One more point need be made before proceeding to the merits of today's state law question. The majority takes a swipe at the New York action suggesting that the Court of Appeals' March 24, 1987, order should be given less than full faith and credit. We are told that the March 24, 1987, proceedings were "less than adversarial." The point is disingenuous. For starters, I wonder if we would apply this approach in the converse situation. Where prior convictions have resulted from guilty pleas, would we say that those proceedings were less than adversarial and therefore give no credit to those convictions as aggravating circumstances. I think not. Further, I am confident the New York Court has displayed no greater penchant for vacating 25-year-old convictions than has this Court. Both pre- and post-*Cardozo*, the Court of Appeals of New York has enjoyed a reputation as one of the nations premiere state courts. I am not for a moment prepared in indulge in the cynical assumption that the New York Court did less than its duty when it ordered Johnson's 1963 conviction vacated.

V.

These things said, we confront a novel question. Where a previous conviction is proved as an aggravating circumstance, Miss.Code Ann. § 99-19-101(5)(b) (Supp. 1986), what is the impact upon a subsequent death sentence where thereafter the "aggravating" prior conviction is vacated? [3]

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[3] The point was before us in *West v. State*, 463 So.2d 1048 (Miss. 1985). At the sentencing phase of West's trial, the prosecution had proved as aggravating circumstances two prior murder convictions in Georgia appeals from which were then pending. After West had been sentenced to die in Mississippi, the Georgia convictions were reversed. *West v. State*, 252 Ga. 156, 313 S.E.2d 67 (1984). We subsequently reversed West's conviction and sentence by reason of error in the guilt phase of his trial and, thus, never reached today's point which would have affected only the sentencing phase.

The point has been addressed, albeit obliquely, in two arguably analogous contexts. First, as indicated above, there is the case of Mississippi's habitual offender statutes. Miss.Code Ann. §§ 99-19-81 and -83 (Supp. 1986). The *Phillips* case discussed above considered an attack upon one of the two prior convictions which had been relied upon by the prosecution in seeking enhanced punishment. *Phillips* makes clear that the fact that the prior conviction is under attack affords the defendant no relief. The logic of the opinion, however, is quite unmistakable: should the prior conviction ultimately be set aside, the defendant would then be entitled to relief from his enhanced sentence.

No resort to a harmless error analysis would be made in such case, for proof of the prior convictions under Section 99-19-81 or 99-19-83, as the case may be, automatically results in enhanced punishment. Assuming vacation of a prior conviction leaves the defendant with only one prior conviction within the meaning of the habitual offender statutes, it would follow as a matter of law that the defendant would be entitled to have his sentence reduced to that provided for the underlying offense without enhancement. *Phillips*, therefore, suggests that Johnson may be entitled to relief from his death sentence.

On the other hand, as a matter of the law of evidence, we have for years held that a defendant could be impeached by a prior felony conviction even though his previous conviction was at the time pending on appeal. And, to be sure, *Nicholson v. State*, 254 So.2d 881, 883-84 (Miss.1971) finds no error in allowing such impeachment, even though the prior conviction is later reversed.[4] 254 So.2d at 884. One may search the *Nicholson* opinion in

[4] The majority's citations to *Young v. State*, 425 So.2d 1022 (Miss. 1983) and *Milstid v. State*, 347 So.2d 1319 (Miss. 1977) are without force or effect, for in neither of those cases had there been a reversal or vacation of the prior conviction used for impeachment.

vain for any reason why this result should obtain. The mere fact that a defendant's conviction of a previous offense is treated as final, though on appeal, begs the question of the effect to be given that prior conviction should it be reversed. *Nicholson* makes quite clear that

> after the conviction has been reversed it cannot be used for impeachment purposes until the defendant is again convicted.

254 So.2d at 884.

It would seem to follow upon ordinary reasoning that the reversal of the impeaching prior conviction should have the same effect on a pre-reversal trial.

My thought regarding the impeachment via conviction on appeal issue is that the prosecution, or any other party so using such a prior conviction, proceeds at its own risk. If the prior conviction on appeal should remain undisturbed—and that is certainly what happens in the overwhelming majority of cases, there is no infirmity in any new conviction. Where, however, the *Nicholson* situation arises, that is, where the impeachment conviction is later reversed, the structure of the argument would seem to become one of whether the harmless error rule applies. I have come to prefer a recent articulation of that rule, i.e., does the error at trial undermine confidence in the outcome? *See Malone v. State*, 486 So.2d 367, 368 (Miss. 1986).

I none sense the case at bar falls between the habitual offender situation considered in *Phillips* and the impeachment context of *Nicholson*. The prior conviction is certain to have an adverse impact upon one tried under the habitual offender statute. The impact of a prior conviction in an impeachment context is far more problematic. In the case at bar, we simply have no way of ascertaining with confidence whether the prior conviction was a significant factor in the jury's determination that Johnson should suffer the penalty of death. The jury was in-

structed at the penalty phase trial that the prior conviction was one aggravating circumstance it could consider. The prosecuting attorneys certainly argued that this aggravating circumstance was one that merited the death penalty. The "age" on the 1963 conviction could cut either way. On the one hand, the jury might have considered it remote and therefore given it little credit. On the other hand, the fact that Johnson had been involved in a violent crime in 1963 may have led others rationally to perceive that his penchant for violence had spanned two decades, his behavior beyond correction or reformation. We simply don't know.

Because of these uncertainties—and in the context of the fact that Samuel Bice Johnson's life is at stake—the majority quite correctly eschews rejection of Johnson's claim on a harmless error basis. Such is consistent with the numerous cases wherein we recognize that sentences of death are qualitatively different in severity from any other that the defendant is to be given the benefit of the doubt when questions of prejudicial impact arise. *See, e.g., Fisher v. State*, 481 So.2d 203, 211 (Miss.1985); *Jones v. State*, 461 So.2d 686, 690 (Miss.1984); *Billot v. State*, 454 So.2d 445, 455 (Miss.1984); *Neal v. State*, 451 So.2d 743, 750 (Miss. 1984); *Williams v. State*, 445 So.2d 798, 810-11 (Miss. 1984); *Laney v. State*, 421 So.2d 1216, 1217 (Miss.1982); *Irving v. State*, 361 So.2d 1360, 1363 (Miss.1978). The majority manages, nevertheless, to deny Johnson's petition.

VI.

These things said, in my view Johnson is entitled to relief. He has presented this Court with a certified copy of the order of the Court of Appeals of New York of March 24, 1987, sufficient that we should hold that as a matter of law that he has proved the factual basis of his post-conviction claim. Past that, the effect of the vitiation of his 1963 conviction as a matter of law for the reasons

set forth above, I would hold that vitiation of Johnson's 1963 New York conviction undermines confidence in the outcome of the penalty phase of his capital murder trial. I do not see how in candor the contrary may be contended. Accordingly, I would vacate the sentence of death imposed upon Johnson and restore the case to the active docket of the Circuit Court for a new trial on the question of sentence only.

PRATHER and SULLIVAN, JJ., join in this opinion.

IN THE SUPREME COURT OF MISSISSIPPI

AFFIDAVITS SUBMITTED TO COUNTY COURT FOR MONROE COUNTY, NEW YORK, IN SUPPORT OF MOTION TO VACATE JUDGMENT OF CONVICTION IN *PEOPLE* v. *JOHNSON*, INDEX 32/63, FILED JULY 30, 1986

STATE OF NEW YORK
COUNTY COURT
MONROE COUNTY

Indictment No. 32 (1963)

THE PEOPLE OF THE STATE OF NEW YORK,

—against—

SAMUEL BICE JOHNSON,
Defendant-Petitioner.

NOTICE OF MOTION

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavits of Anthony Paduano, Esq., Warren H. Heilbronner, Esq., the Honorable Richard D. Rosenbloom, Edward J. Nowak, Samuel Bice Johnson, Dorothy LaDelfa, and Michael Providence, the annexed affirmation of Anthony Paduano, Esq., and the accompanying Memorandum of Law and the existing record of all the proceedings heretofore had herein, pursuant to Section 440.10 of the Criminal Procedure Law a motion will be made in the County Court of Monroe, Part I thereof,

The Honorable John J. Connell, at the Courthouse, Hall of Justice, Rochester, New York, on the 8th day of August, 1986 at 9:30 a.m., or as soon thereafter as counsel can be heard, for an order vacating the March 12, 1963 conviction of the defendant or, in the alternative, for an order directing a hearing on the issues of whether the conviction was invalid as a matter of law because it was obtained (a) in violation of petitioner's right under state and federal constitutions and state statute, to the presence of counsel at interrogations which were conducted after initiation of formal criminal proceedings against petitioner, and during which the alleged confession was made; (b) in violation of petitioner's state and federal rights to be advised of his right to appeal from said conviction and to have appellate counsel appointed for him; and (c) in violation of the petitioner's state and federal constitutional rights to a separate hearing to determine the voluntariness of an alleged confession received in evidence against him at the trial resulting in said conviction; and for such other relief as the Court deems just and proper.

Dated: New York, New York
July 30, 1986

Yours, etc.

CAHILL GORDON & REINDEL
(a partnership including
professional corporations)
80 Pine Street
New York, New York 10005
(212) 701-3000
Attorneys for Defendant-Petitioner
Samuel Bice Johnson

To: Hon. Howard Relin
District Attorney, Monroe County
201 Hall of Justice
Rochester, New York 14614

STATE OF NEW YORK
COUNTY COURT
MONROE COUNTY

Indictment No. 32 (1963)
THE PEOPLE OF THE STATE OF NEW YORK

—against—

SAMUEL BICE JOHNSON,
Defendant-Petitioner.

AFFIDAVIT OF ANTHONY PADUANO IN SUPPORT OF MOTION TO VACATE JUDGMENT OF CONVICTION

STATE OF NEW YORK)
: ss:
COUNTY OF NEW YORK)

ANTHONY PADUANO, being duly sworn, deposes and says that:

1. I am a member of the Bar of the State of New York and an associate of the firm of Cahill Gordon & Reindel, 80 Pine Street, New York, New York 10005. I am one of the attorneys for Samuel Johnson, the petitioner herein. I make this affidavit in support of a motion pursuant to Criminal Procedure Law, § 440.10 subd. 1(h) to vacate his March 12, 1963 conviction for second degree assault on the ground that it was obtained in violation of petitioner's rights under the federal constitution and the constitution of this State.

2. Petitioner seeks review of his 1963 conviction because it is the principal aggravating circumstance relied upon by the State of Mississippi as justification for affirming a sentence of death imposed upon petitioner following his conviction for a capital murder in Mississippi.

3. Petitioner was indicted on February 21, 1963 in Monroe County, Indictment No. 32, for the crime of assault in the second degree. He was tried by jury in this Court between March 8-12, 1963, and a verdict of guilty was returned. Petitioner was sentenced on April 9, 1963 to 1½ to 3 years in prison. He was paroled on April 9, 1984, after serving one year. In 1967 petitioner filed but did not timely perfect an appeal of his 1963 conviction.

4. In 1971 petitioner wrote to this Court requesting review of that conviction. The Court construed his letter as a *coram nobis* petition, but denied it without a hearing on the merits. Petitioner responded affirmatively when asked by the Court whether he wished to file a notice of appeal from the denial, and the Public Defender's Office of Monroe County was appointed to represent petitioner on appeal. Due to ineffective assistance of counsel, however, such appeal was never prosecuted.

5. Petitioner's conviction was based in part on an involuntary confession introduced into evidence at his trial. *See* Affidavit of The Honorable Richard Rosenbloom; Affidavit of Samuel Bice Johnson. The confession was taken following indictment, while petitioner was in custody and without the presence of counsel. *See* Affidavit of Warren H. Heilbronner; Johnson Aff't. Its introduction at trial violated petitioner's rights under the New York State Constitution and the then applicable Code of Criminal Procedure.

6. Petitioner's rights were further violated by the trial court's failure to conduct a separate hearing on the voluntariness of the alleged confession before admitting it as evidence. *See People* v. *Huntley*, 15 N.Y.2d 72, 255 N.Y.S.2d 838 (1965).

7. Further, petitioner's right to appeal his 1963 conviction was effectively denied because he was never in-

formed of such right during his sentencing hearing, as is required by New York law. This was also error under *Douglas* v. *California*, 372 U.S. 353 (1963).

8. The state again violated petitioner's constitutional right to appellate counsel in connection with his subsequent effort to obtain post-conviction review and relief by appointing counsel who failed completely to perform. *See* Affidavit of Edward J. Nowak, Public Defender.

9. Review of petitioner's 1963 conviction is complicated by the State's loss or destruction of the record of the trial and other critical records of the case. *See* Affidavit of Dorothy LaDelfa; Affidavit of Michael Providence. Under New York law, the unavailability of these essential records requires reversal when a defendant has been deprived of his right to appeal. Moreover, without any record of the trial proceedings, it would be virtually impossible for the Court to conduct a full and fair *Huntley* hearing on the voluntariness of the confession on which the 1963 conviction depended.

10. A previous *pro se* application that may have petitioned for the relief sought herein was made and dismissed in 1971. No decision on the merits was rendered, however, and no appeal was ever taken by petitioner's court-appointed appellate counsel.

11. Inasmuch as there is a legal basis for vacating petitioner's March 12, 1963 conviction, and there is a factual basis for the assertion of such ground supported by the affidavits and exhibits submitted herewith, this Court should either grant the motion or direct a hearing on defendant's claim pursuant to Section 440.10 of the Criminal Procedure Law.

/s/ Anthony Paduano
ANTHONY PADUANO

Sworn and subscribed to before me this 29th day of July, 1986.

[Notary seal omitted in printing]

STATE OF NEW YORK
COUNTY COURT
MONROE COUNTY

Indictment No. 32 (1963)

THE PEOPLE OF THE STATE OF NEW YORK

—against—

SAMUEL BICE JOHNSON,
Defendant-Petitioner.

AFFIDAVIT OF THE HONORABLE RICHARD D. ROSENBLOOM

The affiant, the Honorable Richard D. Rosenbloom, in support of petitioner's motions for post-conviction relief, deposes and says:

1. My name is Richard D. Rosenbloom and I am a Justice of the Supreme Court of the State of New York and my chambers are in the Hall of Justice, Rochester, New York 14614.

2. In 1963 I participated in a program in the Monroe County Court whereby young attorneys were assigned from a pool to represent indigent persons accused of crimes. In February 1963 I was appointed by the County Court to represent Charles Taylor, who had been indicted on a charge of assault in the second degree. The petitioner, Samuel Bice Johnson, at the time known as Bice, was Taylor's co-defendant.

3. After being indicted for assault in the second degree, and a two-day trial by jury, the defendants were

found guilty. Taylor was sentenced to 2½ to 5 years; Johnson was sentenced 1½ to 3 years. Taylor, to my knowledge, did not take an appeal at the sentencing proceeding, the Court did not advise Taylor that he could take an appeal. I have had no contact with Taylor since his sentencing.

4. Because more than 23 years have passed since the trial and sentencing I have some difficulty in recalling all the facts of the case. I remember, however, that Taylor's defense was one of alibi. I recall also that Johnson's defense centered mostly on his assertion that he was actually "play-acting" with the woman involved in the crime.

5. For Johnson's part of the trial, the prosecution relied heavily on statements made by Johnson that amounted to a confession. The confession was prejudicial to the defendants, and I made a motion for a separate trial because of concern that the jury would use the substance of the confession against Taylor, my client, who made no confession. I submitted a request to charge the jury that Johnson's confession could not be considered to determine the guilt of Taylor. That request was granted by the Court.

6. I recall that Johnson's attorney, Warren H. Heilbronner, Esq., vigorously defended Johnson against the indictment. The accuracy and voluntariness of the confession introduced against Johnson were challenged by the defense. I know that I argued to the jury that it was its duty to determine whether the confession used against Johnson was given by him voluntarily.

7. I maintain in my files certain documents pertaining to the Taylor-Johnson trial. I do not, however, have transcript of the trial, nor have I ever seen such.

8. No separate hearing was conducted by the Court on the voluntariness of Johnson's confession. The trial of Taylor and Johnson took place well before the retro-

active decision of *People* v. *Huntley*, 15 N.Y.2d 72, 77, 255 N.Y.S.2d 838, 842-43 (1965) that requires a hearing apart from the trial when the voluntariness of a defendant's confession is at issue.

/s/ Richard D. Rosenbloom
RICHARD D. ROSENBLOOM
J.S.C.

Sworn and subscribed to before me this 28th day of July, 1986.

[Notary seal omitted in printing]

STATE OF NEW YORK
COUNTY COURT
MONROE COUNTY

Indictment No. 32 (1963)

THE PEOPLE OF THE STATE OF NEW YORK

—against—

SAMUEL BICE JOHNSON,
Defendant-Petitioner.

AFFIDAVIT OF WARREN H. HEILBRONNER

The affiant, Warren H. Heilbronner, Esq., in support of petitioner's motions for post-conviction relief, deposes and says:

1. I am a member of the bar of the State of New York and of the firm of Mousaw, Vigdor, Reeves, Heilbronner & Kroll. I maintain an office at 600 First Federal Plaza, Rochester, New York 14614.

2. When I was a young attorney, I was, like others, "volunteered" to represent indigent criminal defendants. In February 1963 I was appointed by Monroe County Judge George D. Ogden to defend Samuel Bice Johnson, known to me at that time as Samuel Bice against, charges of assault in the second degree.

3. I remember interviewing Johnson in prison and I believe it was just prior to his arraignment on February 26, 1963. I did not see Johnson prior to his indictment on February 21, 1963, which I believe was the date on

which I was appointed to represent Johnson by the Court.

4. I distinctly remember counsel for co-defendant Charles Taylor, now Justice Richard D. Rosenbloom, and I protesting vehemently to the Court that with such a short time between the indictment (February 21, 1963) the arraignment (February 26, 1963) and the order to start trial (March 8, 1963), we had inadequate time to investigate thoroughly into all of the facts prior to the start of the trial on March 10, 1963.

5. I recall no other specifics about Johnson's case. I have checked our firm's files and I have no documents pertaining to the case, the file in the case having been destroyed under our firm's file management program. I remember well that a good defense was presented by Johnson over the two day trial, and that Justice Rosenbloom and I cooperated in coordinating the defenses. Justice Rosenbloom and I were acquaintances, having been at the Columbia University Law School at the same time. I have a recollection that Taylor and Johnson testified, and that a police officer testified regarding statements on a confession made by Johnson.

6. I recall that the defendants were convicted of assault in the second degree. I do not believe that Johnson made a timely appeal and I recall that the Court at sentencing did not advise the defendants they had a right to appeal. I do not recall if I advised Johnson regarding an appeal. I have had no contact with Johnson since the day he was sentenced on April 9, 1963. I have never seen a transcript of the trial.

7. The Court did not hold a separate hearing on the voluntariness of Johnson's confession, although such issue was important to Johnson's defense. The Johnson-Taylor trial was held and the defendants convicted prior to the decision of *People* v. *Huntley*, 15 N.Y.2d 72, 77,

255 N.Y.S.2d 838, 842-43 (1965) that retroactively required a separate hearing on the voluntariness issue.

/s/ Warren H. Heilbronner
WARREN H. HEILBRONNER

Sworn to and subscribed before me this 28th day of July, 1986.

[Notary seal omitted in printing]

STATE OF NEW YORK
COUNTY COURT
MONROE COUNTY

Indictment No. 32 (1963)

THE PEOPLE OF THE STATE OF NEW YORK

—against—

SAMUEL BICE JOHNSON,
Defendant-Petitioner.

STATE OF NEW YORK)
: ss.:
COUNTY OF MONROE)

AFFIDAVIT OF EDWARD J. NOWAK

Edward J. Nowak, being duly sworn, deposes and says that:

1. My name is Edward J. Nowak and I am the Public Defender of the County of Monroe, New York. I maintain an office in the Executive Office Building, 10 North Fitzhugh Street, Rochester, New York 14614. I submit this Affidavit in support of petitioner's motion to vacate judgment of conviction.

2. Prior to my being appointed Public Defender in April, 1977, I was Chief of the Appeals Bureau in the Office of the Public Defender, from 1976 to April, 1977. For a period of some years, centering around 1970-71 and thereafter, the Office of the Public Defender came under intense public criticism for the inadequacy of its representation of indigent defendants. The Office at that time was severely under-funded and under-staffed. By

1971, the quality of representation provided by the Office had deteriorated to the point that, in 1972, the Monroe County Legislature contracted with the National Legal Aid and Defender's Assocition to evaluate the quality of its representation of indigent defendants. The resulting report was severely critical of management, administration, and services provided by the Office during the 1971-73 period.

3. I have reviewed the papers submitted by Samuel Bice Johnson in support of his motion to vacate his conviction by this Court in 1963 for second degree assault. It is my opinion, based on many years of representing criminal defendants in Monroe County and in the Supreme Court of New York, Appellate Division, 4th Department, that a court of competent jurisdiction in New York very likely will declare Johnson's conviction invalid and unconstitutional as a matter of law, and will issue an order vacating such conviction.

4. The grounds for relief alleged by Johnson are meritorious and present important issues under the laws of New York and the United States Constitution. Any one of Johnson's principal claims—custodial interrogation without presence of counsel, absence of post-conviction hearing to determine the voluntariness of his confession, failure of this Court to advise him of his right to appeal, and the State's failure to provide competent appellate counsel—is in my judgment sufficient ground to vacate the 1963 conviction. Together the grounds present an argument for post-conviction relief which, in my judgment, a New York court will find highly compelling.

5. Johnson's case is particularly compelling given that the State of New York has lost or destroyed critical records pertaining to the 1963 conviction, including the trial transcript, the jury instructions and the purported confession made by Johnson. It is beyond dispute that a New York court will at the very least set aside the 1963 conviction and order an evidentiary hearing as mandated by *People* v. *Huntley*, 15 N.Y.2d 72, 255 N.Y.S.2d 838 (1965), to examine the issues raised by Johnson. It is my judgment, however, that the 1963 conviction should and will be vacated, given the seriousness and fundamental nature of the constitutional error demonstrated by Johnson, together with the irremediable prejudice to his rights caused by the State's loss of essential trial records, and the fact that Johnson has already served his prison term for a conviction infected with constitutional error.

6. Johnson alleges that he received ineffective assistance of appellate counsel from this Office with respect to proceedings for post-conviction relief in 1971-72. I understand from examination of the records of this Office, and from information received from the Clerk's Office of the Supreme Court of New York, Appellate Division, 4th Department, that in 1971 Johnson filed a Notice of Appeal. Upon docketing Johnson's appeal, the Appellate Division, 4th Department, appointed the then Monroe County Public Defender, Nicholas Varlan, to represent Johnson in this appeal. However, for reasons of which I am not aware, but which surely were related to the difficult conditions under which the Office labored during that time, Johnson's appeal was never acted upon in any way by the Public Defender's Office.

[Conformed Copy; Executed and Notarized July 30, 1986]

_____

EDWARD J. NOWAK

Sworn and Subscribed to before me this — day of July, 1986

_____

Notary Public

STATE OF NEW YORK
COUNTY COURT
MONROE COUNTY

Indictment No. 32 (1963)

THE PEOPLE OF THE STATE OF NEW YORK

—against—

SAMUEL BICE JOHNSON,
Defendant.

STATE OF NEW YORK)
: ss:
COUNTY OF MONROE)

AFFIDAVIT OF SAMUEL BICE JOHNSON

The affiant, Samuel Bice Johnson, in support of his petition for post-conviction relief, deposes and says:

1. My name is Samuel Bice Johnson and I am incarcerated in the maximum security unit of the Mississippi State Penitentiary in Parchman, Mississippi under a sentence of death.

2. In 1963 I was convicted by Jury in this Court of assault in the second degree. I was sentence to 1½ to 3 years in prison. I was paroled for good behavior after one year.

3. I have a good recollection of the facts concerning my 1963 conviction for assault second. Charles Taylor and I were in my brother's car, which he loaned to me,

in the early morning hours of February 9, 1963. We picked up Malcena Doss after she was leaving another car. Doss was a prostitute. After I had sex with her I told her I had no money to pay her and refused to pay her and she got angry. She took down the number of the car and later she told the police that I attacked her. I didn't attack her.

4. Two days later on February 11, 1963, I was at my brother's house when two police officers came to the house and asked my brother where his car was the previous night. He said I had it. The officers asked me to come down to the police station. At the station one of the officers told me that a woman had reported being attacked and wanted to know where I had been with the car. I told him that I didn't attack anyone. I was arrested on February 11, 1963.

5. Later, in police custody, I was questioned in the police station. My nephew, brother and a friend, were with me. The detective who arrested me came in and told my brother, newphew and friend to leave. Then he told me that he had an indictment against me for attacking Malcena Doss and showed me the indictment. I was indicted on February 21, 1963.

6. After I was indicted and in jail I was questioned again by the detective. The detective told me that he knew I didn't attack anyone and that he knew Doss was lying. He said he just wanted to clear things up and told me to tell him what happened while I was with Doss. I told him constantly that I didn't attack anyone and for awhile this was all I said.

7. Then the detective and his partner talked to me. Then they brought Doss into the room with me and she said I was the person who attacked her. I told her that she was telling a damn lie and that she gave it to me. The detective took her away and left me with his partner who along with threatening to kill me, promised me that

I was going to get 20 years. I told him that I didn't attack Doss.

8. Then three uniformed police officers came into the room and all four of them started talking about messing me up if I didn't confess. They pushed me around a bit and then the detective came back into the room. The rest of them left.

9. The detective then told me that if I talked to him I wouldn't have to talk with them any more plus that I could see my mother who by this time had come to the police station. I told him that I didn't attack Doss and that she had became angry when I wouldn't pay her. The detective tried to get me to sign a statement but I wouldn't.

10. The detective took me into a room where Doss and a stenographer were. She said that I had attacked her and the stenographer wrote it all down. I said I didn't do it. The detective took Doss out and came back. He, the stenographer and I were in the room and he told me he could clear everything up without me having to go to court and I could go home if I told him and the stenographer what had really happened. I remember they had been talking to me and pushing me constantly without any break for a long time. I remember it was more than one whole day and I think it was about twelve or sixteen hours non-stop. So I talked to the detective and stenographer and told them what they wanted to hear. I didn't sign anything. He then locked me up but he did let me see my mother for about five minutes. Later, that day I was brought into the courtroom and arraigned before the judge.

11. I didn't see a lawyer until just before we went to court. I remember that it was a long time after I talked to the detective and the stenographer. I went in front of the judge and he appointed Warren Heilbronner to represent me. I saw the lawyer one time before we went to

trial. I remember that a police officer testified at the trial that I had confessed and that the district attorney introduced the statement as evidence against me. The judge did not ask me if my statements were voluntary. Mr. Heilbronner and I tried to prove that the police had coerced the statements from me in exchange for the promise that I could go home without going to court.

12. I was found guilty and I served one year in jail. At the time I was found guilty and sentenced I was not advised by the Court or by my attorney that I had a right to appeal. When I pleaded guilty to the charges brought against me later in 1966, 1975, and 1977, it was because my lawyers for those trials told me that my 1963 conviction was valid and therefore I was much better off pleading because otherwise I would have gotten a more severe sentence. I wouldn't have pleaded guilty to any of those charges if I had known that the 1963 conviction was invalid.

/s/ Samuel Bice Johnson
SAMUEL BICE JOHNSON

Sworn and Subscribed To Before Me This 29th Day of July, 1986

[Notary seal omitted in printing]

SUPREME COURT OF THE UNITED STATES

No. 87-5468

SAMUEL B. JOHNSON,
Petitioner

v.

MISSISSIPPI

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Questions 1 and 2 presented by the petition.

January 11, 1988